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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1982

THE STATE OF COLORADO,
Petitioner,

vs.

ANTONIO GUADALUPE NUNEZ,
Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF COLORADO

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

When both the defendant and the trial court concede during a hearing on a motion to suppress that the credibility of the affiant to a search warrant's affidavit is not at issue, is the trial court's order requiring the prosecution to reveal a confidential informant's identity beyond the scope of the Fourth Amendment?

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JURISDICTIONAL STATEMENT

After the trial court suppressed certain evidence in this case, the prosecution filed an Interlocutory Appeal in the Colorado Supreme Court pursuant to C.A.R. 4.1. On February 22, 1983, that Court affirmed the trial court's decision and issued its remittitur. (Appendix 1). Because the State may not request a rehearing of issues decided in an Interlocutory Appeal (Appendix 35), the prosecution filed a motion to recall and to stay the remittitur on February 25, 1983. (Appendix 25). The Colorado Supreme Court denied that request on February 28, 1983. (Appendix 28). The government then asked the trial court to stay any further proceedings in this case pending this Court's review. (Appendix 30). The trial judge granted that request on March 9, 1983. Based upon 28

U.S.C.A. Sec. 1257(3), this Court has jurisdiction to resolve the issue presented in this case.

In Delaware v. Prouse, 440 U.S. 648 (1979), the Delaware Supreme Court relied upon both the federal and that State's constitutions in its ruling. Although the prosecution argued that the State court's references to the State constitution deprived this Court of jurisdiction, Justice White wrote that this Court could review the Delaware Court's decision because that court had historically discussed both constitutions together and had apparently interpreted them to have the same scope. Because the Delaware Supreme Court analyzed its own constitution in light of this Court's decisions, Justice White stated that the United States Supreme Court had jurisdiction to hear that case.

This Court has adopted a similar analysis in at least two cases decided after Prouse. In Oregon v. Kennedy, 72 L.Ed.2d 416 (U.S. Sup. Ct. 1982), this Court decided a case in which the merits involved both state and federal grounds. The majority held that this Court had jurisdiction to resolve that case because the Oregon Supreme Court had relied heavily upon its prior decisions that interpreted the United States Constitution.

In South Dakota v. Neville, 74 L.Ed.2d 748 (U.S. Sup. Ct. 1983), Justice O'Connor wrote that this Court would decide a case in which the South Dakota Supreme Court referred to both the federal and State constitutions. The Neville majority held that the State Supreme Court had first found that a statute had abridged the Fifth Amendment

privilege against self-incrimination before it held that the same statute also offended South Dakota's Constitution. While the State grounds may have been adequate, Justice O'Connor wrote that those grounds were not independent. As in Prouse, the cases upon which the South Dakota Court relied in its opinion analyzed the United States Constitution.

The Colorado Supreme Court's decision in this case was based upon its interpretation of the United States Constitution, not upon independent and adequate State grounds. As in Kennedy and Neville, the Colorado Supreme Court has historically relied upon this Court's decisions that involve federal constitutional principles. The following Colorado cases, which all involve the issue of whether a court should order the prosecution to disclose the identity of

an informant, rely, in whole or in part, upon this Court's decisions in either Roviaro v. United States, 353 U.S. 53 (1957), McCray v. Illinois, 386 U.S. 300 (1967) or Franks v. Delaware, 438 U.S. 154 (1978): Whaley v. People, 171 Colo. 287, 466 P.2d 927 (1970); McNulty v. People, 174 Colo. 494, 483 P.2d 946 (1971); People v. Glaubman, 175 Colo. 41, 485 P.2d 711 (1971); Parlapiano v. District Court, 177 Colo. 36, 496 P.2d 626 (1972); DeLaCruz v. People, 177 Colo. 46, 492 P.2d 627 (1972); People v. Quintana, 183 Colo. 81, 514 P.2d 1325 (1973); People v. Brown, 185 Colo. 272, 523 P.2d 986 (1974); People v. Musgrave, 187 Colo. 135, 529 P.2d 313 (1974); People v. Marquez, 190 Colo. 255, 546 P.2d 482 (1976); People v. Langford, 191 Colo. 87, 550 P.2d 329 (1976); People v.

Mulligan, 193 Colo. 509, 568 P.2d 449 (1977); People v. Korte, 198 Colo. 474, 602 P.2d 2 (1979); People v. Del Alamo, 624 P.2d 1304 (Colo. 1982); People v. Dailey, 639 P.2d 1068 (Colo. 1982); People v. Bueno, 646 P.2d 931 (Colo. 1982); People v. Martinez, 658 P.2d 260 (Colo. 1983); People v. McLean, 81SC269 (Colo. March 28, 1983).

In the case at bar, the Colorado Supreme Court relied upon People v. Dailey, supra, People v. Bueno, supra, and People v. Martinez, supra. Those three cases each refer to and rely upon some of the prior Colorado decisions that are listed above. Clearly, each of those three decisions is predicated upon a line of cases that was resolved by the Colorado Supreme Court's interpretation of the Fourth Amendment and by its reference to, and reliance upon, this

Court's opinions in Roviaro, McCray and Franks.

In Dailey, the Colorado Court adopted Franks. That Court also referred at 1074 and 1075 to the Colorado Constitution. However, as in Neville, those references were made only after the Colorado Court had resolved the issues under the United States Constitution and this Court's decisions. In fact, when the Colorado Supreme Court discussed the scope of remedies that a court could impose if it discovered certain defects in a search warrant's affidavit, Justice Lohr wrote at 1075:

> We consider it inadvisable to attempt to develop consequences which would follow under the United States and Colorado Constitutions from each of the various possibilities as to the origin of the error. [Emphasis supplied].

While the Dailey court referred to the Colorado Constitution when it discussed the burden that an accused must meet at a "veracity hearing" and when it referred to possible defects in an affidavit that were developed at such a hearing, when the Colorado Supreme Court discussed the factors that a trial judge should consider in deciding whether to order the prosecution to reveal an informant's identity, the Colorado Court relied exclusively upon decisions that involved the United States Constitution. In fact, Justice Lohr wrote at 1077 that Colorado has "adopted the same test" to determine if disclosure is appropriate that this Court established in Roviaro. Clearly, any state constitutional grounds that could support the Colorado Supreme Court's decision in this case are neither independent of the federal grounds, nor

were they applied at all to the question of when disclosure of the informants identity is appropriate. This Court, therefore, has jurisdiction to resolve the issue raised in this case.

STATEMENT OF THE CASE

On November 7, 1981, pursuant to a warrant, Denver Police Officers and Adams County Sheriff's Deputies searched a house located at 8690 Norwich Street, unincorporated Adams County, Colorado. During this search, these officers searched the person of the defendant, Antonio Nunez. The officers discovered fifteen balloons in Mr. Nunez's pocket, which contained a substance later analyzed to be heroin. Based upon this evidence, the prosecution charged the defendant with Possession of a Schedule I Controlled Substance, contrary to C.R.S.

1973, §12-22-309, as amended, and C.R.S. 1973, §18-18-105(2)(a), as amended.

Through counsel, Mr. Nunez filed a motion to suppress the heroin seized from him and a motion requesting that the trial court order the prosecution to disclose the name of a confidential informant upon whose statements the search warrant executed on November 7, 1981, was partially based. (Appendix 11, 15). On September 9, 1982, the District Court held a hearing on those motions. The affidavit for the warrant was introduced at the hearing. It contained information provided by three separate confidential informants. Defense counsel stated that he only sought the disclosure of one informant, alleging that only that person's credibility was an issue.

The affiant, Denver Police Sergeant

Don DeNovellis, had written that the informant in question had told Sergeant DeNovellis that the informant had seen the defendant with a "large amount of heroin" within twenty-four hours of November 7, 1981. The informant said that the defendant had stated that he had just returned from Mexico, where he had purchased five ounces of heroin. The informant watched the defendant dilute the heroin and then package it in balloons. Sergeant DeNovellis wrote that the informant recognized heroin because he/she had previously used it. Sergeant DeNovellis also noted that the informant had previously provided him with reliable information that had led to seizures of heroin.

Defense counsel conceded that the credibility of the affiant, Sergeant DeNovellis, was not at issue. Instead,

he questioned the informant's veracity. He argued that the informant's identity should be revealed so that he could subpoena the informant to testify at the suppression hearing.

The defendant testified in order to support his attorney's allegations. The defendant stated that on October 31, 1981, he had driven his motorhome from his house on Norwich Street to the mountains in order to hunt. He said he was accompanied by his father, his son, his nephew and a friend. The defendant stated that he had returned from his trip in the early morning hours of November 6, 1981. While he spent all of that day at the Norwich Street address, he insisted that no one visited his home except for his immediate family and at least eight other relatives. He denied that he had travelled to Mexico between October 31

and November 6. He also stated that he did not know what heroin was. The defense did not present the testimony of any of the people who allegedly went hunting with the defendant or of anyone who had been at his home on November 6, 1981.

The prosecution argued that the trial court should not order the police to disclose the informant's identity. First, the prosecutor mentioned that disclosure of the informant's identity could endanger that person's safety. Second, he pointed out that defense counsel was not questioning the affiant's credibility, but rather the credibility of the informant. Third, he observed that the prosecution would not use the informant as a witness at trial because the informant was not a witness to the incident upon which the charge was based.

Fourth, he submitted that there was no disagreement between the informant's statement and the defendant's testimony. He concluded by stating that defense counsel had not established that disclosure of the informant's identity would be essential to the motion to suppress.

After hearing arguments of both counsel, the trial court found that disclosure of the informant's identity was necessary to resolve the motion to suppress and ordered the prosecution to reveal the informer's name. The prosecutor subsequently informed the court that he would not disclose the informant's identity because he was concerned for his/her safety. On October 7, 1982, the trial court, in a written opinion (Appendix 18), found that disclosure of the informant was essential

to the resolution of the case. Because the prosecution refused to disclose the informant's identity, the trial court suppressed the evidence taken from the defendant in the search that occurred on November 7, 1981. (Appendix 23). Pursuant to C.A.R. 4.1, the prosecution then took an Interlocutory Appeal to the Colorado Supreme Court.

ARGUMENT

THE COLORADO SUPREME COURT'S DECISION IN THIS CASE INCORRECTLY EXTENDS THIS COURT'S DECISIONS THAT INVOLVE CONFIDENTIAL INFORMANTS BEYOND THE SCOPE OF STATE ACTION AND PERMITS AN ACCUSED TO OBTAIN THE IDENTITY OF A CONFIDENTIAL INFORMANT BY PRESENTING ANY EVIDENCE AT ALL.

In Roviaro v. United States, 353 U.S. 53 (1957), this Court recognized and approved of an "informer's privilege."

Justice Burton described the rationale for that privilege at 59:

> The purpose of the privilege is the furtherance and the protection of the public interest in effective law enforcement. The privilege recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law enforcement officials, and by preserving their anonymity, encourages them to perform that obligation.

However, this Court recognized that this privilege is not absolute. If a trial court finds that disclosure of an informer's name would be helpful to an accused's defense or if disclosure were necessary to the just resolution of a case, then that court could order the State to relinquish the informer's identity.

While, in the appropriate case, justice demands that an accused discover

the name of his accuser, this Court has indicated that trial judges should not treat the "informer's privilege" lightly. In Roviaro at 645, footnote 9, this Court quoted, with approval, Scher v. United States, 305 U.S. 251 (1938):

> [P]ublic policy forbids disclosure of an informer's identity unless essential to the defense, as, for example, where this turns upon an officer's good faith. [Emphasis supplied].

Scher indicates that unless there is a proper demonstration by an accused that he needs to know who the informant was in order to prepare his case, a court cannot order the prosecution to reveal the informer's name.

A defendant's request to learn an informant's identity normally arises in two situations. First, an informant may have been a participant in or a witness

to the event upon which a criminal charge has been based. In that factual framework, courts frequently order the State to tell the accused the informer's name because the informer may possess exculpatory evidence. The issue presented, therefore, is one of guilt or innocence. The case at bar does not involve this situation.

Second, an informant may have provided the police with information that, either alone or when combined with other facts, establishes probable cause for the police to arrest someone or to search that person's house or possessions. If this information is incorporated into an affidavit for a search warrant, it must satisfy the two pronged test that this Court established in Aguilar v. Texas, 378 U.S. 108 (1964)

and Spinelli v. United States, 393 U.S. 410 (1969). Of course, the purpose of the Aguilar-Spinelli test is to require the police-affiant to include enough reliable information in the affidavit to assure a reviewing magistrate that the police are not inventing "facts" so that they can obtain judicial approval to search a suspects home and thereby unjustifiably invade his Fourth Amendment rights.

However, the Aguilar-Spinelli test did not resolve the question of whether an accused could discover the name of the informant who supplied information included in a search warrant's affidavit. In McCray v. Illinois, 386 U.S. 300 (1967), an accused sought the name of an informant who had provided a police officer with information that led to the accused's warrantless arrest. In

upholding the trial judge's decision to deny that request, this Court recognized that when a defendant at a suppression hearing seeks the name of an informant who provided information to the police that led to the seizure of evidence from him, he seeks to avoid his guilt.

This Court recognized in McCray that the purpose of the suppression hearing that involves a confidential informant is to determine if the police have violated the Fourth Amendment. Justice Stewart, quoting New Jersey's Chief Justice Weintraub, underscored this position at 307-308:

> [T]he magistrate is concerned, not with whether the informant lied, but with whether the affiant is truthful in his recitation of what he was told. If the magistrate doubts the credibility of the affiant, he may require that the informant be identified or even produced. [Emphasis supplied].

In Franks v. Delaware, 438 U.S. 154 (1978), this Court held that an accused, at a motion to suppress, could attack the veracity of the affiant to a search warrant's affidavit. Justice Blackmun wrote that the purpose of this "veracity attack" was to assure that the police did not mislead a reviewing magistrate and to protect the Fourth Amendment rights of citizens. When combined with Aguilar-Spinelli, Franks provides an opportunity for both courts and defendants to assure themselves that police-affiants have told the truth in their affidavits.

While Franks at 170 left open the issue of whether an informant's identity should be disclosed after an accused has made a proper demonstration that there were falsehoods in an affidavit, this Court clearly set out what the

fundamental elements of that demonstration must be. Justice Blackmun described those components at 171:

> There is, of course, a presumption of validty with respect to the affidavit supporting the search warrant. To mandate an evidentiary hearing, the challengers attack must be more than conclusory and must be supported by more than a mere desire to cross examine. There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof....Allegations of negligence or innocent mistake are insufficient. The deliberate falsity or reckless disregard whose impeachment is permitted today is only of the affiant, not of any nongovernmental informant. [Emphasis supplied].

This Court's position that a veracity attack only involves a police-affiant's, not an informant's, credibility, has been echoed in state and federal courts in cases that have been

decided both before and after Franks. United States v. Edwards, 602 F.2d 458 (C.A. 1 1979); United States v. Barnes, 604 F.2d 121 (C.A. 2 1979); United States v. Metz, 608 F.2d 147, (C.A. 5 1979); United States v. Carmichael, 489 F.2d 983 (C.A. 7 1973); United States v. Skramstad, 649 F.2d 1259 (C.A. 8 1981); United States v. Chesher, 678 F.2d 1353 (C.A. 9 1982); United States v. Schauble, 647 F.2d 113 (C.A. 10 1981); United States v. Weingarten, 485 F.Supp. 1167 (D.C.N.J. 1979); United States v. Burke, 490 F.Supp. 855 (D.C.Fla. 1980); United States v. Dorfmann, 542 F.Supp. 345 (D.C.Ill. 1982); Thornton v. State, 390 So.2d 1093 (Ala.Cr.App. 1980), cert. den. 450 U.S. 998 (1980); Schmid v. State, 615 P.2d 565 (Alaska 1980); State v. Keener, 110 Ariz. 462, 520 P.2d 510 (1974); Theodor v. Superior Court, 104 Cal.Rptr.

226, 501 P.2d 234 (1972); People v. Brumfield, 55 Ill.Dec. 687, 426 N.E.2d 1012 (1981); State v. Boyd, 224 N.W.2d 609 (Ia. 1974); State v. Hemerding, 5 Kan.App. 797, 626 P.2d 210 (1981); State v. Babbit, 363 So.2d 690 (La. 1978); State v. Chase, 439 A.2d 526 (Me. 1982); Commonwealth v. Brown, 429 N.E.2d 47 (Mass.App. 1981); People v. Johnson, 83 Mich.App. 1, 268 N.W.2d 259 (1978); State v. Luciow, 308 Minn. 6, 240 N.W.2d 833 (1976); State v. Boyd, 492 S.W.2d 787 (Mo. 1973), cert. den. 414 U.S. 1069 (1973); State v. Butler, 207 Neb. 760, 301 N.W.2d 332 (1981); State v. Spero, 117 N.H. 199, 371 A.2d 1155 (1977); State v. Burnett, 42 N.J. 377, 201 A.2d 39 (1965); State v. Cervantes, 92 N.M. 643, 593 P.2d 648 (1979); People v. Alfinito, 264 N.Y.S. 243, 211 N.E.2d 644 (1965); Commonwealth v. Bradshaw, 434

A.2d 181 (Pa.Super. 1981); State v. Brown, 618 S.W.2d 365 (Tenn.Cr.App. 1981); Laque v. State, 627 S.W.2d 781 (Tex.App. 1982); State v. Larson, 26 Wash.App. 564, 613 P.2d 542 (1980). Aside from Colorado, research has not revealed any jurisdiction that permits an accused to attack only an informant's credibility at a veracity hearing and then to ask a trial court to order the prosecution to disclose the informant's identity.

There are at least two reasons why this Court in McCray and Franks limited the situations in which an accused could successfully request and obtain an informer's name. First, if a veracity attack is not limited to the affiant, an accused will frequently present unverifiable evidence that the informant has lied. As this Court recognized in

McCray, at 306:

> If a defendant may insist upon disclosure of the informant in order to test the truth of the officer's statement that there is an informant or as to what the informant related or as to the informant's reliability, we can be sure that every defendant will demand disclosure He has nothing to lose and the prize may be the suppression of damaging evidence if the State cannot afford to reveal its source, as is so often the case. And since there is no way to test the good faith of a defendant who presses the demand, we must assume the routine demand would have to be routinely granted.

The case at bar presents exactly the scenario that this Court feared and predicted in McCray. Armed with an affidavit that complied with the Aguilar-Spinelli test, the police searched the defendant's home and person and took from him fifteen balloons that contained heroin. Clearly, the informant had not only been proved reliable in the

affidavit, but the subsequent search by the police further corroborated the informant's reliability when they discovered heroin, contained in balloons, on the defendant's person. Yet, at the motion to suppress, the defendant said that the informant could not have seen what the informant stated that he or she saw. The defendant then testified that he did not know what heroin was, although the police had taken a large amount of it from his own pocket.

The danger of not limiting a veracity challenge to the affiant's credibility is clear. If an accused can attack an informant's statements, then only the human imagination can limit the testimony about the informant that the accused could present. Because, unlike an officer-affiant, an informer is not

available for consultation or testimony during a suppression hearing, it would be difficult, if not impossible, to refute even the wildest defense allegations. In this situation, as McCray points out, trial judges would have little choice but to order the prosecution to reveal the informer's name. This result would eviscerate the "informer's privilege."

Second, the Fourth Amendment, and the exclusionary rule that is used to protect that amendment, only regulate government action. Budreau v. McDowell, 256 U.S. 465 (1921); Coolidge v. New Hampshire, 402 U.S. 443 (1971). While a trial court should suppress evidence if that action is necessary to deter police misconduct, it cannot extend the Fourth Amendment's reach to private action. As the long list of cases cited above indicates, even if an informant

intentionally lies, a trial court reviewing an affidavit should not, and cannot, take any action against the State unless the police-affiant knowingly or recklessly participated in that lie. In order to convince a court to order the informant's name to be disclosed, a defendant must establish some police misconduct that can only be properly investigated by questioning the informant.

In the case at bar, both the trial court and defense counsel stated that the affiant's credibility was not at issue. Therefore, the only possible reason that could justify a disclosure order vanished. In other words, without an allegation that the State's representative had abridged the defendant's constitutional rights, the Fourth Amendment could not be invoked to

obtain a remedy. But, the trial court nonetheless ordered the prosecution to disclose the informer's name. When the Colorado Supreme Court affirmed that decision, it incorrectly extended the Fourth Amendment beyond State action and into private activity. Obviously, the Fourth Amendment does not go that far.

In this case, the search warrant's affidavit complied with the Aguilar-Spinelli test. By satisfying those conditions, the affidavit provided the reviewing magistrate with probable cause to believe that the defendant possessed heroin. At the suppression hearing the defendant did not satisfy Franks or McCray because he conceded that the affiant's credibility was not at issue. However, even though the State followed each of the rules that this Court has established to govern cases

that involve confidential informants, the Colorado Supreme Court held that the informant's name must nonetheless be revealed. If that disclosure can be obtained on flimsy evidence designed only to impeach a private person, then this Court's carefully crafted rules have been rendered meaningless and the "informer's privilege" has died.

CONCLUSION

In it's decision in this case, the Colorado Supreme Court has effectively emasculated the "informer's privilege." While an accused Fourth Amendment rights should be protected, this Court's decisions in Aguilar, Spinelli, Roviaro, McCray and Franks have established a process with which the State must comply in order to obtain a search warrant. That process not only protects an

accused's privacy by assuring that the police must supply a magistrate with adequate, reliable information before a search warrant is issued, but it also permits an accused to attack that warrant after it has been executed by demonstrating that the government's agents lied or recklessly disregarded the truth. The opinion in this case subverts that process, and the strong public interest behind the "informer's privilege," by permitting an accused, who supplies any evidence at all, to obtain the name of an informant even when the actions of the State's representatives have not been questioned. This Court should issue a writ of certiorari to the Colorado Supreme Court in order to review this decision. Then, in order to stop the erosion of the "informer's privilege" that will harshly and irrevocably cripple

fair and effective law enforcement, this Court should reverse that decision.

Respectfully submitted,

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APPENDIX A

IN THE SUPREME COURT OF THE
STATE OF COLORADO

Case No. 82SA512

February 22, 1983

THE PEOPLE OF THE STATE OF COLORADO,
Plaintiff-Appellant

vs.

ANTONIO GUADALUPE NUNEZ,
Defendant-Appellee

Interlocutory Appeal from
the District Court of the
County of Adams

Honorable Philip F. Roan, Judge

EN BANC ORDER AFFIRMED

Paul Q. Beacom, District Attorney
Steven L. Bernard, Chief Trial Deputy
Brighton, Colorado

Attorneys for Plaintiff-Appellant

Karp, Goldstein & Stern
Kenneth H. Stern
Denver, Colorado

Attorney for Defendant-Appellee

JUSTICE DUBOFSKY delivered the opinion of the Court.

In this interlocutory appeal under C.A.R. 4.1, the People seek reversal of the Adams County district court's order suppressing evidence seized during a search of the defendant's house. The suppression order was entered following the district attorney's refusal to disclose the identity of one of the confidential informants upon whose statements the affidavit in support of the search warrant was based, in part. We affirm the suppression order.

On November 7, 1981, police sergeant Don DeNovellis executed an affidavit for a search warrant before a Denver district court judge, who issued a warrant authorizing a search of two motor vehicles and a house at 8690 Norwich Street in Denver. The affidavit stated in part:

On 11-7-81 your affiant received information from a previously reliable confidential informant, that the said previously reliable confidential informant was at the location of 8690 Norwich Street in the past 24 hours of that date (11-7-81) and observed Antonio "Pic" Nunez with a large amount of heroin in his possession. This previously reliable confidential informant further related that Mr. Nunez was in the process of cutting (diluting) heroin and was also putting the heroin in balloon packages. Mr. Nunez told the previously confidential informant that he had just returned from Mexico and had purchased five ounces of heroin while he was there, bringing the heroin across the Mexico-United States border himself. This previously reliable confidential informant is knowledgeable in the packaging and appearance of heroin and has admitted to your affiant that said informant has used heroin in the past. This previously reliable C.I. has been reliable on at

> least two occasions within the past 18 months, giving your affiant information involving narcotic activity, and resulting in the recovery of quantity of heroin.

Upon receiving the warrant, narcotics officers searched the house at 8690 Norwich Street and seized 9.6 grams of heroin from the defendant. Nunez was arrested and charged with one count of possiession of heroin, a Schedule I controlled substance, in violation of section 18-18-105, C.R.S. 1973 (1978 Repl. Vol. 8, 1982 Supp.).

The defendant filed motions to suppress and for disclosure of confidential informants. No supporting affidavit accompanied either motion. At the motions hearing, the district court granted the defendant's oral motion to amend the motion to suppress and to present an offer of proof in lieu of the

supporting affidavits required by People v. Dailey, 639 P.2d 1068 (Colo. 1982). The district attorney stated that while he preferred that the affidavits be filed, he would consent to the presentation of the offer of proof in their stead. The court then took testimony on Nunez' veracity challenge to the statements of the confidential informant.[1]

The defendant testified that he had been on a hunting trip from October 31 until November 6, 1981, and that no one but family members had been in his house on November 6, the date that the confidential informant was supposed to have seen him cutting heroin. The defendant also stated that he had not been to Mexico nor told anyone that he had been to Mexico during the week of October 31 to November 6. Sergeant

DeNovellis testified that his informant alleged that he or she had been at Nunez' house on November 6, had seen Nunez with heroin then, and had been told by Nunez about his recent return from Mexico. Given the conflict in testimony, the district court ordered the district attorney to disclose the identity of the confidential informant or face suppression of the evidence seized during the search. When the district attorney refused to divulge the identity of the informant, the court granted the defendant's motion to suppress.[2]

The People argue that the disclosure of confidential informants is limited to situations in which the veracity of the affiant-police officer is successfully attacked. This contention misapprehends the holding of People v. Dailey. Dailey recognized that errors in an affidavit

for a search warrant can result "from the informant's perjury or reckless disregard for the truth, or from the negligence or good faith mistake of either the officer or the informant." 639 P.2d at 1075. When, following a veracity hearing, the probability of one of those kinds of error has been found, the election of remedies or sanctions is left to the discretion of the district court. The necessary foundation for the court's exercise of discretion in ordering disclosure is a showing of a reasonable basis in fact to question the accuracy of the informant's recitals. People v. Martinez, ____ P.2d ____ (Colo. 1983) (No. 82SA294, announced February 7, 1983) slip op. at 5; People v. Bueno, 646 P.2d 931, 935-6 (Colo. 1982).

Our result in this case follows from People v. Martinez, supra.[3] Where the

district court has determined that the defendant has shown a good faith basis in fact to question the accuracy of an affidavit containing recitals based on information supplied by an unnamed informant and consequently has ordered that the informant be disclosed or be produced for an in camera hearing,[4] we will not disturb that ruling. When the People refused to disclose the identity of the informant, the district court properly suppressed the evidence seized during the search of the defendant's house.

The order of the district court is affirmed.

/1

The defendant limited his challenge to that portion of the affidavit set out in text, supra. He specifically identified as untrue the allegations that a confidential informant had been at his house on November 6, 1981, and that he

had told that person of his recent return from Mexico. The remainder of the affidavit contained the allegations of two other confidential informants, neither of whom specifically attested to having seen the defendant participate in any criminal activity.

/2

The defendant argues that because suppression was ordered as a sanction for nondisclosure and was merely collateral to the disclosure issue, this court lacks jurisdiction to hear the People's interlocutory appeal under C.A.R. 4.1. A ruling granting a defendant's pre-trial motion to suppress is subject to interlocutory appeal under C.A.R. 4.1. The defendant's contention is controlled by our holding in People v. Dailey, supra, where we determined that an order granting the defendant's motion to disclose a confidential informant was "so intimately related" to the order suppressing evidence that it fell within the interlocutory appeal authorization of C.A.R. 4.1. 639 P.2d at 1076, n. 8.

/3

We note that here, as in Martinez, the defendant failed to comply with the prerequisites of People v. Dailey for motions and affidavits filed to seek suppression of evidence seized under a challenged search warrant. The People acquiesced in the waiver of those prerequisites at the hearing, however, and do not raise the point on appeal.

/4

The People did not request an in camera hearing at which the informant would be present for judicial interrogation in accordance with the guidelines in Dailey, supra at 1077, n. 11.

APPENDIX B

IN THE DISTRICT COURT
IN AND FOR THE COUNTY OF ADAMS
AND STATE OF COLORADO

Case No. 81F1429

THE PEOPLE OF THE STATE
OF COLORADO,

vs.

ANTONIO NUNEZ,
Defendant.

MOTION TO SUPPRESS

COMES NOW the defendant, by his attorneys, KARP, GOLDSTEIN & STERN by the undersigned, and moves this Court for an Order suppressing as evidence against the defendant in any criminal proceedings, any and all statements elicited from the defendant by law enforcement officers on the date of and subsequent to defendant's arrest for the crime alleged in the above captioned action, and to suppress any and all physical evidence seized from the person, presence, vehicle and/or premises

of the defendant or visual observations made by law enforcement officers, on or about the time of said arrest and as grounds for this Motion defendant states the following:

1. On or about November 7, 1981, the defendant was arrested by members of the Denver Police Department and Adams County Sheriff's Department.

2. Subsequent to the defendant's arrest, certain physical evidence was seized from the person, presence, or vehicle of the defendant, statements may have been elicited from the defendant by said officer concerning the alleged offense charged in this action and visual observations may have been made by said officers.

3. There was no probable cause to sustain the issuance of a search warrant in the instant case, the search warrant

that was obtained was improperly executed, the defendant was arrested without first procurring an arrest warrant, the evidence seizured was not seized pursuant to a valid arrest nor was said seizure properly incident to or within the scope of a valid arrest and in general, the aforementioned search of the defendant's residence and his arrest took place in violation of state and federal law.

4. At the time of his arrest, statements were elicited from the defendant without the proper advisement and said statements were not voluntarily made by the defendant.

5. Any evidence obtained subsequent to and at the time of the above mentioned arrest were the fruits of an invalid arrest and was obtained under such circumstances that its use in a

trial against this defendant would constitute an illegal search and seizure and would constitute a deprivation of defendant's life and liberty without due process of law, in violation of the Fourth, Fifth and Fourteenth Amendments to the United States Constitution and Article II, Sections 7 and 25 of the Colorado Constitution.

WHEREFORE, defendant requests that this Court enter its Order suppressing as evidence against him the above described evidence and statements and all evidence which is the direct fruit of the above described evidence and statements.

Respectfully submitted,

KARP, GOLDSTEIN & STERN

BY: /s/ Kenneth H. Stern
Attorney for defendant
1760 Lafayette Street
Denver, Colorado 80218
(303) 861-8580

APPENDIX C

IN THE DISTRICT COURT
IN AND FOR THE COUNTY OF ADAMS
AND STATE OF COLORADO

Case No. 81F1429

THE PEOPLE OF THE STATE
OF COLORADO

vs.

ANTONIO NUNEZ,
Defendant.

MOTION FOR DISCLOSURE OF INFORMANT

COMES NOW the defendant by and through his attorneys KARP, GOLDSTEIN & STERN, and moves this Court to Order the law enforcement authorities involved in the instant case to disclose the name, address, and phone number of all informants employed in the instant case and as grounds therefore states the following:

1. In obtaining information which was subsequently used in the search warrant, the law enforcement authorities

involved in the instant case mentioned the presence and involvement of unnamed confidential informants and unnamed citizen witnesses.

2. Both for purposes of challenging the legality of the search in the instant case, as well as defending against the instant charges, the defendant needs disclosure of the names, addresses, and phone numbers, of said informants and citizen witnesses.

3. In the interest of justice, and in order to protect the due process rights of the defendant and his right to a fair trial and the effective assistance of counsel, disclosure of the above described informants and citizen witnesses is absolutely essential.

WHEREFORE, the defendant requests that this Court order disclosure of the

aforementioned informants and citizen witnesses.

Respectfully submitted,

KARP, GOLDSTEIN & STERN

BY: /s/ Kenneth H. Stern
Attorney for defendant
1760 Lafayette Street
Denver, Colorado 80218
(303) 861-8580

APPENDIX D

IN THE DISTRICT COURT
IN AND FOR THE COUNTY OF ADAMS
AND STATE OF COLORADO

Criminal Action No. 82CR0025

THE PEOPLE OF THE STATE
OF COLORADO,

vs.

ANTONIO G. NUNEZ,
Defendant.

FINDINGS OF FACT, CONCLUSIONS OF
LAW AND ORDER

The Defendant's MOTION FOR DISCLOSURE OF INFORMANT having come before the Court on September 9, 1982, and the Court having heard testimony and the arguments of counsel and being fully advised in the premises, does make the following Findings of Fact, Conclusions of Law and Order:

1. On November 7, 1981, a member or members of the Denver Police Department prepared an affidavit for

search warrant and based upon said affidavit, obtained a search warrant for 8690 Norwich Street, Adams County, Colorado, and two named vehicles.

2. During the execution of said search warrant, approximately rifteen balloons of heroin were recovered.

3. The affidavit, upon which issuance of the search warrant was predicated, related information from a previously reliable confidential informant that the informant was at the location of 8690 Norwich within the twenty-four hour period from November 6, 1981 to November 7, 1981 and observed Antonio "Pic" Nunez in possession of a large amount of heroin, that Nunez was cutting the heroin, that Nunez was putting the heroin in balloon packages, that Nunez told the informant that he had just returned from Mexico where he had

purchased five ounces of heroin which he brought into the United States.

4. The Defendant filed a motion seeking disclosure of the identity of the informant described in Paragraph 3 above.

5. The Motion for Disclosure is two pronged alleging a need for the purpose of challenging the legality of the search and a need for defending against the substantive charge.

6. At the hearing, the Defendant testified that he had been on a hunting trip for the week proceeding the date of the affidavit and search, having arrived home on November 6, 1981. He also testified he had driven the motor home described in the affidavit on the hunting trip. The defendant further testified that from the time he returned home to the time the search warrant was executed, only immediate family members had been

present in his home and that he had not engaged in the activities described by the confidential informant.

7. The Court finds that as to the legality of the search issue, the Defendant has made the required initial showing pursuant to People v. Bueno, Vol. VI, Brief Times Reporter, p.522 (June, 1982).

8. The Court finds that as to the issue of disclosure on the basis of the informant's being an essential witness on the issue of guilt or innocence, the Defendant has made a showing of a reasonable basis in fact to believe the informant is a likely source of relevant and helpful evidence to the accused.

9. The Court, therefore, orders the District Attorney to disclose the identity of the confidential informant to the Defendant and failing that, the Court

orders suppression of the evidence seized pursuant to the search warrant.

Done and signed in Open Court this 7th day of October, 1982.

BY THE COURT:

/s/ Philip F. Roan
Philip F. Roan
Chief Judge

copies to counsel
10/7/82

APPENDIX E

IN THE DISTRICT COURT
IN AND FOR THE COUNTY OF ADAMS
AND STATE OF COLORADO

Criminal Action No. 82CR0025

THE PEOPLE OF THE STATE
OF COLORADO,

vs.

ANTONIO G. NUNEZ,
Defendant.

ORDER

THE COURT being advised by the District Attorney that the identity of the confidential informant will not be disclosed to the Defendant, the evidence which is the subject of the Defendant's Motion to Suppress is, therefore, suppressed.

Done and signed in Open Court this 12th day of October, 1982.

BY THE COURT:

/s/ PHILIP F. ROAN
Philip F. Roan
Chief Judge

copies to counsel
10/12/82

APPENDIX F

SUPREME COURT, STATE OF COLORADO

Case No. 82SA512

THE PEOPLE OF THE STATE
OF COLORADO,

vs.

ANTONIO GUADALUPE NUNEZ,
Defendant.

MOTION TO RECALL AND TO
STAY REMITTITUR

The plaintiff, by counsel, respectfully requests that this Court recall the remittitur issued in this case and stay the issuance of any remittitur for sixty days. As grounds for this motion, the plaintiff alleges:

1. The interlocutory appeal in this case was filed pursuant to C.A.R. 4.1.

2. This Court affirmed the district court's decision in an opinion issued on February 22, 1983.

3. This Court issued its remittitur on February 22, 1983.

4. The prosecution, by a petition for a writ of certiorari, intends to seek review of this Court's decision in this case in the United States Supreme Court.

5. Pursuant to United States Supreme Court Rule 20, the prosecution must file its petition for a writ of certiorari within sixty days of this Court's final decision, or by April 23, 1983.

6. This Court should recall the remittitur issued on February 22, 1983, and stay the issuance of any remittitur until April 23, 1983, so that the prosecution can seek review in the United States Supreme Court of this Court's decision in this case.

WHEREFORE, the plaintiff respectfully requests that this Court

recall the remittitur previously issued in this case and stay the issuance of any remittitur until April 23, 1983.

Respectfully submitted,

PAUL Q. BEACOM,
District Attorney
Seventeenth Judicial District

By: /s/ Steven L. Bernard
Steven L. Bernard, #8897
Chief Trial Deputy
450 South Fourth Avenue
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APPENDIX G

SUPREME COURT, STATE OF COLORADO

Case No. 82SA512

INTERLOCUTORY APPEAL FROM THE
DISTRICT COURT, ADAMS COUNTY

THE PEOPLE OF THE STATE
OF COLORADO,

vs.

ANTONIO GUADALUPE NUNEZ,
Defendant.

ORDER OF COURT

Upon consideration of the Motion to Recall and to Stay Remittitur filed by counsel for Plaintiff-Appellant herein, and now being sufficiently advised in the premises,

It Is This Day Ordered that said Motion shall be, and the same hereby is, Denied.

BY THE COURT, FEBRUARY 28, 1983.

cc: Steven L. Bernard
Chief Trial Deputy
450 South Fourth Avenue
Brighton, CO 80601

Kenneth H. Stern
KARP, GOLDSTEIN & STERN
1763 Franklin Street
Denver, CO 80218

APPENDIX H

IN THE DISTRICT COURT
IN AND FOR THE COUNTY OF ADAMS
AND STATE OF COLORADO

Case No. 82CR0025

THE PEOPLE OF THE STATE
OF COLORADO,

vs.

ANTONIO G. NUNEZ,
Defendant.

MOTION TO STAY PROCEEDINGS

The Plaintiff, by counsel, respectfully requests that this Court stay all proceedings in this case pending further appellate review.

AND AS GROUNDS THEREFORE STATES:

1. The plaintiff is charged with Possession of Schedule I Controlled Substance contrary to C.R.S. 1973, §12-22-309, as amended and C.R.S. 1973, §18-18-105(2)(a), as amended.

2. On October 7, 1982, this Court ordered the prosecution to reveal a confidential informant.

3. Pursuant to C.A.R. 4.1, the prosecution filed an interlocutory appeal in the Colorado Supreme Court to seek review of the Court's decision.

4. On February 22, 1983, the Colorado Supreme Court affirmed this Court's decision in People v. Nunez, 82SA512. The Supreme Court issued its remittitur on that same day.

5. On February 25, 1983, the prosecution filed in the Colorado Supreme Court a Motion to Recall and to Stay Remittitur. The prosecution requested that action because it intends to petition the United States Supreme Court for a writ of certiorari in order to review the Colorado Supreme Court's decision.

a. The Colorado Supreme Court denied that request.

6. The prosecution still intends to petition the United States Supreme Court for a writ of certiorari in this case. Pursuant to United States Supreme Court Rule 20, this petition must be filed within sixty days of the Colorado Supreme Court's decision, or by April 23, 1983.

7. Therefore, this Court should stay further proceedings in this case so that the prosecution can obtain appropriate review of the Colorado Supreme Court's decision.

8. Because a petition for a writ of certiorari to the United States Supreme Court is the only process that the prosecution can use to obtain review of the Colorado Supreme Court's decision in this case, it is the prosecution's

position that the time taken to petition for that writ should be excluded from speedy trial calculations.

WHEREFORE, the plaintiff respectfully requests that this Court stay any further proceedings in this case until the United States Supreme Court has decided whether to issue a writ of certiorari to the Colorado Supreme Court.

Respectfully submitted,

PAUL Q. BEACOM
District Attorney
Seventeenth Judicial District

By: /s/ Steven L. Bernard
Steven L. Bernard, #8897
Chief Trial Deputy

ORDER

The Court, having read this motion and being informed of the surrounding circumstances, stays all further proceedings in this case until the United States Supreme Court has decided whether

to issue a writ of certiorari to the Colorado Supreme Court.

DONE THIS 9th day of March, 1983.

/s/ Philip F. Roan
DISTRICT COURT JUDGE

APPENDIX I

Rule 4.1. Interlocutory Appeals In Criminal Cases

* * * *

(g) Disposition of Cause. No oral argument shall be permitted except when ordered by the court. The decision of the court shall be by written opinion, copies of which shall be transmitted by the clerk of the court by mail to the trial judge and to one attorney on each side of the case. No petition for rehearing shall be permitted. Remittitur shall accompany said opinion.

Supreme Court, U.S.
FILED
NOV 12 1983
ALEXANDER L. STEVAS
CLERK

No. 82-1845

In The

Supreme Court of the United States

October Term, 1983

THE STATE OF COLORADO,

Petitioner,

vs.

ANTONIO GUADALUPE NUNEZ,

Respondent.

On Writ of Certiorari to the Supreme Court of Colorado

JOINT APPENDIX

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Attorney for Respondent

PETITION FOR CERTIORARI FILED APRIL 22, 1983.
CERTIORARI GRANTED OCTOBER 3, 1983.

COCKLE PRINTING CO., 2311 Douglas St., Omaha 68102

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RELEVANT DOCKET ENTRIES

1. Affidavit for Search Warrant
   Search Warrant
   Return and Inventory
   Signed: November 7, 1981
   Executed: November 7, 1981

2. Information
   Filed in District Court: November 12, 1981

3. Motion for Disclosure of Deals and Compensation
   Filed in District Court: February 25, 1982

4. Motion for Disclosure of Informant
   Filed in District Court: February 25, 1982

5. Motion to Supress
   Filed in District Court: February 25, 1982

6. Motion to Dismiss, Or In The Alternative, to Suppress
   Filed in District Court: September 28, 1982

7. Hearing on Motion to Supress
   Held in District Court: September 9, 1982

8. Continued Hearing on Motion to Supress
   Held in District Court: September 24, 1982

9. Continued Hearing on Motion to Suppress
   Held in District Court: October 4, 1982

10. Findings of Fact, Conclusions of Law and Order
    Entered by District Court: October 7, 1982

11. Order
    Entered by District Court: October 12, 1982

12. Notice of Interlocutory Appeal
    Filed in District Court: October 18, 1982

13. Opening Brief
    Filed in Colorado Supreme Court on November 29, 1982

14. Answer Brief
    Filed in Colorado Supreme Court on December 16, 1982

15. Reply Brief
    Filed in Colorado Supreme Court on December 29, 1982

16. Opinion of Colorado Supreme Court
    Issued on February 22, 1983

COUNTY COURT

In the County Court, City and County of Denver, State of Colorado

AFFIDAVIT FOR SEARCH WARRANT
BEFORE THE UNDERSIGNED COUNTY JUDGE

The undersigned, an officer authorized by law to execute warrants within the City and County of Denver, State of Colorado, being duly sworn deposes and says: That he (has reason to believe) that (on the premises) (in the vehicle) known as 8690 Norwich Street & Vehicles: 1975 Ford pick-up (Lic. #TM 7478), 1978 Dodge Mobile Home (Lic. TZ 819) in the County of Adams, State of Colorado, there is now located certain property, to-wit: Controlled substances (including but not limited to coca leaves, coca leaf derivatives, opium, opium derivatives, depressant drugs, hallucinogenic drugs, stimulant drugs, tranquilizers) and Marihuana and Marihuana concentrate all as defined in Colorado Revised Statutes 12-22-303, as amended, together with vessels, implements and furniture used in connection with the manufacture, production, storage or dispensing of such substances and articles of personal property tending to establish the identity of persons in control of contraband, related paraphernalia consisting in part and including, but not limited to utility company receipts, rent receipts, cancelled mail envelopes, photographs and keys. (Which said property is destined or intended for use, or which is or has been used as a means of committing a criminal offense or the possession of which is illegal would be material evidence in a subsequent criminal prosecution. And the facts tending to establish the foregoing grounds for issuance of a search warrant are as follows:

That I, Sgt. DeNovellis, presently assigned to the Major Peddler Unit (specialized Narcotic Enforcement Unit) of the Denver Police Department, have been involved in a narcotic investigation for the past three months involving Antonio "Pic" Munez (12-12-48). This investigation originally started when a confidential citizen informant suspected narcotic transaction at 8690 Norwich St., the residence of Antonio Nunez. During the past three months the confidential citizen informant has given license numbers of vehicles coming and going from the Norwich St. address to your affiant. The citizen informant reported to your affiant that some of these vehicles would drive up to the Norwich St. address, park the vehicle, and the occupant would go into the residence, stay a short time, and leave. The citizen informant was not able to get all of the license numbers of the vehicles going to and from the location. The citizen informant further stated that during the daytime hours a party known only as "Pat" would meet with some of these parties coming to the Norwich St. address.

On 11-3-81 your affiant received information from a different confidential informant who related to your affiant that a party named Antonio "Pic" Nunez was actively engaged in the sale of heroin at the location of 8690 Norwich St. This informant further reported that Nunez was out of town at that time, and that a party known to this informant as "Pat" was making the sales of heroin for Antonio Nunez out of a residence in the vicinity of W. 33rd Ave and Irving St. This confidential informant further reported that "Pat" would be in possession of Nunez's heroin and would be selling the heroin until Nunez returned to town. This confidential informant further

stated that "Pat" was driving a white station wagon (foreign made) and that it was usually in the vicinity of W. 33rd Ave. & Irving St. Your affiant responded to this location on 11-4-81 and observed a similar vehicle at W. Moncrieff PL. & Irving St. This vehicle had a license plate of CB-5962 (Colo.) which listed to Antonio Nunez at the Norwich St. address. All of the information given by this confidential informant has been substantiated. In addition, the white station wagon (CB-5962) has been observed at the Norwich St. address on several occasions by the citizen informant.

On 11-7-81 your affiant received information from a previously reliable confidential informant, that the said previously reliable confidential informant was at the location of 8690 Norwich St. in the past 24 hours of that date (11-7-81) and observed Antonio "Pic" Nunez with a large amount of heroin in his possession. This previously reliable confidential informant further related that Mr. Nunez was in the process of cutting (diluting) the heroin and was also putting the heroin in balloon packages. Mr. Nunez told the previously reliable confidential informant that he had just returned from Mexico and had purchased five ounces of heroin while he was there, bring the heroin across the Mexico-United States border himself. This previously reliable confidential informant is knowledgeable in the packaging and appearance of heroin and has admitted to your affiant that said informant has used heroin in the past. This previously reliable C. I. has been reliable on at least two occasions within the past 18 months, giving your affiant information involving narcotic activity, and resulting in the recovery of a quantity of heroin. (CONTINUED ON PAGE 2)

Signature of Affiant

_____

Sworn to before me and subscribed in my presence this 7th day of November, 1981, in the City and County of Denver, State of Colorado.

Affidavit for Search Warrant

/s/ Edward E. Carilli
District Judge

AFIDAVIT FOR SEARCH WARRANT (Continued)

Some of these investigations are still pending further investigation.

The information received from all three confidential sources has been cooberated [sic] through surveillance by members of the Major Peddler Unit of the Denver Police Dept. and by your affiant.

Narcotic intelligence information gathered by your affiant and other members of the Major Peddler Unit, show that Antonio "Pic" Nunez (d.o.b. 12-12-48) D.P.D. No. 144509 resides at 8690 Norwich St. and reportedly has been actively engaged in heroin trafficking and was in fact arrested for Sale of Heroin on 7-16-81.

Further, the previously reliable confidential informant related to your affiant that Nunez has made deliveries of heroin driving a motor home (license No. TZ-819) and a red Ford pick-up truck (license No. TM-7478), within the past two weeks of this date (11-7-81).

Due to the information above, it is requested that a search warrant be issued for 8690 Norwich St. and for the 1975 Ford pick-up truck (lic. No. TM7478) and for the Dodge motor home (license No. TZ-819).

/s/ Sgt. D. De Novellis, affiant

Sworn to before me and subscribed in my presence this 7th day of November 1981, in the City and County of Denver, State of Colorado.

/s/ Edward E. Carelli,
District Judge

(Filed November 26, 1982)

In The County/District Court
City and County of Denver,
State of Colorado,
The People of the State of Colorado
Before The Honorable Undersigned Judge

SEARCH WARRANT

(Immediate Entry)

To Investigator R. Waken, Adams County Sheriff, an officer authorized by law to execute search warrants within the City and County of Adams County, State of Colorado. Being duly advised that the affiant, Sgt. D. DeNovellis, has this date filed an affidavit for a search warrant in conformity with the provisions of the Colorado Revised Statutes and the Colorado Rules of Criminal Procedure for the following described property, to-wit: Controlled substance (including but not limited to coca leaves, coca leaf derivatives, opium, opium derivatives, depressant drugs, hallucinogenic drugs, stimulant drugs, tranqualizers) and Marihuana and Marihuana concentrate all as defined in Colorado Revised Statutes

12-22-303, as amended, together with such vessels, implements and furniture used in connection with the manfacture, production, storage or dispensing of such substances and articles of personal property tending to establish the identity of persons in control of contraband, related paraphernalia consisting in part and including, but not limited to utility company receipts, rent receipts, cancelled mail envelopes, photographs and keys, believed to be situated (at the place) (in the vehicle) known as: 8690 Norwich St. Adams County, Colorado, 1975 Ford P.U. TS-7478 trk. 1978 Dodge Mobile Home, Colorado License Plate TZ-819. City and County of Adams County, State of Colorado, upon one or more of the grounds set forth in the Colorado Revised Statutes and the Colorado Rules of Criminal Procedure, namely: That said property is designed or intended for use, or which is, or has been used as a means of committing a criminal offense or the possession of which is illegal would be material evidence in a subsequent criminal prosecution.

Certain property which is designed or intended for use or which is or has been used as a means of committing a criminal offense, or the possession of which is illegal, or which would be material evidence in a subsequent criminal prosecution.

Based upon the affidavit of Sgt. D. DeNovellis, which is incorporated by reference herein, I am satisfied that there is probable cause to believe that the property so described is located (at the place) (in the vehicle) above described. **YOU ARE THEREFORE COMMANDED to search forthwith the place or person described for the property described, and to make return of this warrant to the undersigned Judge within ten days**

thereof, and to deliver to the person, from whom the property is taken, a copy of this Warrant together with a receipt for the property taken, or, in lieu thereof, to leave a copy of the Warrant and receipt at the place from which the property is taken, and to deliver to the undersigned Judge a written inventory of the property taken with the return of this Warrant. You are hereby FURTHER instructed that you may enter the above described place to be searched forcibly without first knocking and announcing your identity and purpose.

Dated this 7th day of November, 1981, in the City and County of Denver, State of Colorado.

Signature of Judge

City and County of Denver
State of Colorado

RETURN AND INVENTORY

I, Sgt. D. DeNovellis, received the within Search Warrant on 11/7, 1981, and duly executed it as follows: On 11/7, 1981, at 2:35 o'clock p. m., I searched (the person) (the premises) described in the search warrant and left a copy of the search warrant with: Antonio Nunez, 8690 Norwich St. Antonio Nunez, name of person searched, or owner, or at the place of search together with an inventory of the property taken.

The following is an inventory of property taken pursuant to the search warrant:

No. 1. 15 multi (balloons)- colored balloon with suspect heroin.

No. 2. $110.00 cash from Antonio Nunez.

No. 3. $47.00 cash from wallet of Nunez.

No. 4. 685.00 cash from closet.

No. 5. 22 caliber 9321 — antique.

No. 6. Assorted multicolored balloons empty.

No. 7. Miscellaneous papers with residency of Nunez.

This inventory was made by Sgt. D. DeNovellis in the presence of Detective Salazar and Detective Ruetz and is a true and detailed account of all property taken pursuant to the search warrant.

---

82 No. CR0025

In The County/District Court

The People of The State of Colorado

vs.

ANTONIO GUADALUPE NUNEZ

(d.o.b. 12/12/48)

A/K/A "PIC"

A/K/A "PICANO"

Possession of a controlled substance, Schedule I [C.R.S. 1973, §12-22-309 & §18-18-105 (2) (a), as amended] F-3

Adams County Sheriff's Office
Witness For The People

Robert Sprecher

Rick Sargene

Richard Waken

Don Johnson

Harold Frankeberger

Joseph Smith

David Lutter

Adams County Sheriff's Office
1831 East Bridge Street
Brighton, CO

Don DeNovellis

Jeff Ruetz

Gary Salazar

John Garcia

Pat Fitzgibbons

Mark Olin

Harry Mills

Denver Police Department
1331 Cherokee
Denver, CO

Permission given to file the within information this

_____ day of _____ 19____

and bail fixed at $_____.

_____

Judge.

For COUNTY COURT USE:

District Attorney recommends bond at $25,000.00.

_____

Deputy District Attorney

Bond is set at $_____.

_____ Judge

Filed in County Court, Adams County, Colo., Nov. 12, 1981
Virginia Schroeder, Clerk of County Court

The People of the State of Colorado Against

ANTONIO GUADALUPE NUNEZ
A/K/A "PIC"
A/K/A "PICANO"

SEVENTEENTH JUDICIAL DISTRICT

In The County/District Court

Paul Q. Beacom, District Attorney within and for the Seventeenth Judicial District of the State of Colorado, in the name and by the authority of the People of the State of Colorado, informs the Court, that on the 7th day of November A.D. 1981, at the said County of Adams in the state of Colorado, Anotonio Guadalupe Nunez did knowingly, unlawfully and feloniously possess a Schedule I controlled substance, to-wit: heroin; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the People of the State of Colorado.

PAUL Q. BEACOM, No. 3759

_____

District Attorney

State of Colorado, County of Adams ss.

Robert Sprecher, upon oath says: That the facts stated in the foregoing complaint/information, hereto attached, are true and that the offense therein charged was committed of this affiant's own personal knowledge.

/s/ Robert Sprecher

Subscribed and sworn to before me this 12th day of November A.D., 1981.

Randall S. White
Notary Public
My Commission Expires July 17, 1984
450 South Fourth Avenue
Brighton, CO 80601-3193
659-7720

Action No. 81 F 1429

District Court
County of Adams
State of Colorado

Motion For Disclosure of Deals or Compensation

People of the State of Colorado

Plaintiff,

vs.

Antonio Nunez,

Defendant.

COMES NOW the defendant by and through his attorneys KARP, GOLDSTEIN & STERN, and requests that this Court Order the Prosecution to disclose any and all deals made with the confidential informants or citizen witnesses involved in the instant case, or any compensation paid to them and as grounds therefore states the following:

1. Upon information and/or belief the confidential informants and citizen witnesses involved in the instant case have received some consideration or compensation in exchange for their services.

2. In order to defend against the instant charges, and to prepare for trial, the defendant needs to have disclosed to him any deals made with or any compensation or consideration given to the confidential informant and/or citizen witnesses who are involved in the instant case.

WHEREFORE, the defendant requests that this Court order the prosecution to disclose all deals made with and any compensation given or consideration given to the confidential informants and citizens witnesses involved in the instant case.

Respectfully submitted,

KARP, GOLDSTEIN & STERN

BY:

/s/ Kenneth H. Stern (9198)
Attorney for defendant
1760 Lafayette Street
Denver, Colorado 80218
(303) 861-8580

CERTIFICATE OF MAILING

I certify that a true and correct copy of the foregoing Motion for Disclosure of Deals and or Compensation was mailed, postage prepaid, to all other counsel of record this 22nd day of February, 1982.

By Nancy Cox

Action No. 81 F 1429

District Court
County of Adams
State of Colorado

Motion For Disclosure of Informant

People of the State of Colorado

Plaintiff,

vs.

Antonio Nunez,

Defendant.

COMES NOW the defendant by and through his attorneys KARP, GOLDSTEIN & STERN, and moves this Court to Order the law enforcement authorities involved in the instant case to disclose the name, address, and phone number of all informants employed in the instant case and as grounds therefore states the following:

1. In obtaining information which was subsequently used in the search warrant, the law enforcement authorities involved in the instant case mentioned the presence and involvement of unnamed confidential informants and unnamed citizen witnesses.

2. Both for purposes of challenging the legality of the search in the instant case, as well as defending against the instant charges, the defendant needs disclosure of the names, addresses, and phone numbers, of said informants and citizen witnesses.

3. In the interest of justice, and in order to protect the due process rights of the defendant and his right to a fair trial and the effective assistance of counsel, disclosure of the above described informants and citizen witnesses is absolutely essential.

WHEREFORE, the defendant requests that this Court order disclosure of the aforementioned informants and citizen witnesses.

Respectfully submitted,

KARP, GOLDSTEIN & STERN
BY:

/s/ Kenneth H. Stern (9198)
Attorney for defendant
1760 Lafayette Street
Denver, Colorado 80218
(303) 861-8580

CERTIFICATE OF MAILING

I certify that a true and correct copy of the foregoing Motion for Disclosure of Informant was mailed, postage prepaid, to all other counsel of record this 22nd day of February, 1982.

By Nancy Cox

Action No. 81 F 1429

District Court
County of Adams
State of Colorado

Motion to Suppress

People of the State of Colorado
Plaintiff,

vs.

Antonio Nunez,
Defendant.

COMES NOW the defendant, by his attorneys, KARP, GOLDSTEIN & STERN by the undersigned, and

moves this Court for an Order suppressing as evidence against the defendant in any criminal proceedings, any and all statements elicited from the defendant by law enforcement officers on the date of and subsequent to defendant's arrest for the crime alleged in the above captioned action, and to suppress any and all physical evidence seized from the person, presence, vehicle and/or premises of the defendant or visual observations made by law enforcement officers, on or about the time of said arrest and as grounds for this Motion defendant states the following:

1. On or about November 7, 1981, the defendant was arrested by members of the Denver Police Department and Adams County Sheriff's Department.

2. Subsequent to the defendant's arrest, certain physical evidence was seized from the person, presence, or vehicle of the defendant, statements may have been elicited from the defendant by said officer concerning the alleged offense charged in this action and visual observations may have been made by said officers.

3. There was no probable cause to sustain the issuance of a search warrant in the instant case, the search warrant that was obtained was improperly executed, the defendant was arrested without first procurring an arrest warrant, the evidence seizured was not seized pursuant to a valid arrest nor was said seizure properly incident to or within the scope of a valid arrest and in general, the aforementioned search of the defendant's residence and his arrest took place in violation of state and federal law.

4. At the time of his arrest, statements were elicited from the defendant without the proper advisement and

said statements were not voluntarily made by the defendant.

5. Any evidence obtained subsequent to and at the time of the above mentioned arrest were the fruits of an invalid arrest and was obtained under such circumstances that its use in a trial against this defendant would constitute an illegal search and seizure and would constitute a deprivation of defendant's life and liberty without due Process of law, in violation of the Fourth, Fifth and Fourteenth Amendments to the United States Constitution and Article II, Sections 7 and 25 of the Colorado Constitution.

WHEREFORE, defendant requests that this Court enter its Order suppressing as evidence against him the above described evidence and statements and all evidence which is the direct fruit of the above described evidence and statements.

Respectfully submitted,

KARP, GOLDSTEIN & STERN

BY:

/s/ Kenneth H. Stern (9198)
Attorney for defendant
1760 Lafayette Street
Denver, Colorado 80218
(303) 861-8580

CERTIFICATE OF MAILING

I certify that a true and correct copy of the foregoing Motion to Suppress was mailed, postage prepaid, to all other counsel of record this 22nd day of February, 1982.
By: Nancy Cox

ACTION NO. 81 F 1429

DISTRICT COURT COUNTY OF ADAMS
STATE OF COLORADO

MOTION TO DISMISS OR IN THE ALTERNATIVE
MOTION TO SUPPRESS

PEOPLE OF THE STATE OF COLORADO,

Plaintiff,

vs.

ANTONIO NUNEZ,

Defendant.

COMES NOW the defendant by and through his attorneys, KARP, GOLDSTEIN & STERN, and moves this court to dismiss the above captioned case, or in the alternative, to grant the defendant's previously filed Motion to Suppress and as grounds therefore states the following:

1. On September 9, 1982, a hearing was held on the defendant's Motion to Disclose Confidential Informant.

2. At the September 9, 1982, hearing, the court ordered the district attorney to disclose the name of said informant in that his testimony was relevant and necessary to a fair adjudication of the defendant's Motion to Suppress Evidence.

3. On September 24, 1982, the district attorney announced to this court that the name of the confidential informant would not be disclosed.

4. In response to the district attorney's decision to not disclose the name of the confidential informant, the

court should dismiss the above captioned criminal prosecution, or in the alternative, must grant the defendant's Motion to Suppress Evidence.

WHEREFORE, the defendant prays that this court enter its order either dismissing the above captioned case or granting the defendant's Motion to Suppress Evidence.

Respectfully submitted,

KARP, GOLDSTEIN & STERN

BY:

/s/ Kenneth H. Stern (9198)
Attorney for defendant
1763 Franklin Street
Denver, Colorado 80218
(303) 861-8580

CERTIFICATE OF MAILING

I certify that a true and correct copy of the foregoing Motion to Dismiss or in the alternative Motion to Suppress was mailed, postage prepaid, to all other counsel of record this 27th day of September, 1982.
By: Mary Shiner

DISTRICT COURT, ADAMS COUNTY, COLORADO
Criminal Action No. 82CR0025, Division E

REPORTER'S TRANSCRIPT

Filed in the Supreme Court of the State of Colorado
Oct. 27, 1982. David W. Brezina, Clerk.

THE PEOPLE OF THE STATE OF COLORADO,
Plaintiff,

vs.

ANTONIO GUADALUPE NUNEZ,
Defendant.

The hearing in this matter commenced on Thursday, September 9, 1982, before the HONORABLE PHILIP F. ROAN, Chief Judge of the District Court in and for the County of Adams, State of Colorado.

FOR THE PLAINTIFF:

OFFICE OF PAUL Q. BEACOM
DISTRICT ATTORNEY, ADAMS COUNTY, COLORADO

450 South Fourth Avenue
Brighton, Colorado 80601

By: JEFFREY L. ROMEO, Registry No. 8454
Deputy District Attorney

FOR THE DEFENDANT:

KENNETH H. STERN, Registry No. 9198
1763 Franklin Street
Denver, Colorado 80219

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(p. 3) (Whereupon, the following proceedings were commenced at the hour of 3:00 p.m.)

The Court: People of the State of Colorado versus Antonio G. Nunez, 82CR0025.

Mr. Romeo: Good afternoon, Your Honor. Jeff Romeo for the People.

The Court: Thank you, Mr. Romeo.

Mr. Stern: Good afternoon, Your Honor. Kenneth H. Stern, 9198, appearing on behalf of the Defendant who is on bond and present in court this afternoon.

The Court: Thank you, Mr. Stern.

Mr. Romeo: Your Honor, there have been a number of motions filed by the defense. It's basically the People's position that they have the burden of going forward on all of these motions. They feel we may have some limited burden to go forward. I'll leave that to the Court's discretion if we have any burden to go forward at this time. I think many or all of these motions can be handled by legal argument alone, and as such I'm ready to proceed.

Counsel has informed me that he wishes to put on testimony, he wishes to attack the veracity of the warrant itself. Unfortunately, his motions fail to comply with the rules as far as attacking veracity of the warrant, and as such I'm going to be objecting to that. Also, he states he's going to call witnesses who are not endorsed to me. And if the Court wants the (p. 4) case law on that, I'd be prepared to give that to the Court.

The Court: What about this motion for return of property, Mr. Romeo. Do you have a position on that?

Mr. Romeo: Your Honor, I do. I think Sergeant DeNovellis has released many of the things that Mr. Nunez has requested be returned. The 35 millimeter Canon AE1 I don't think they ever had, thus they can't return it; miniature Minox camera, they never had that; keys to home and vehicles, they state they left those at the residence; personal papers, obviously we're going to keep those as evidence in this case to show occupancy. And once the case is over with, depending on the appeal status of the case, if any, those may or may not be returned. But I think they are evidence in the case, and we may use those as evidence in the case.

I know Sergeant DeNovellis has told me that he released numerous other things which in fact were not even in the Motion for Return of Property previously. In fact those were picked up by the Defendant on a previous occasion. So basically A through C, the police don't have those items. And D, we are going to keep personal papers as evidence in this case.

The Court: Mr. Stern?

Mr. Stern: Your Honor, with respect to the Motion for Return of Property, I don't know what the Court can do about that at this point in time. There have been numerous items returned, and we appreciate their being returned. The additional (p. 5) items that the Defendant seeks, there is a claim being made that they were never taken; and I don't know how we're going to resolve that: specifically, two cameras — I think a Minolta and a Minox. One is a miniature camera and the other is a 35 millimeter camera — and keys to various pieces of personal property.

I know it's Sergeant DeNovellis' recollection that he left the keys in the motor home. But when Mr. Nunez looked for them in the motor home immediately after being released from bond, they were not present. Also, there were two cameras there prior to the excution of the search warrant that were not there after the execution. However, I know that Sergeant DeNovellis and the other officers maintain that they did not come across those cameras. So that's why I at this point in time was not going to pursue the Motion for Return of Property any further than it had been pursued already based upon that impasse. However, if that impasse is ever broken and the whereabouts of these items are discovered and

they do happen to be in custody, we would at that point resubmit the motion and request that these items be returned.

The Court: All right.

Mr. Romeo: I don't have any problem with that, Your Honor.

The Court: I think that's [emminently] reasonable.

Mr. Stern: Your Honor, may I respond to the two things (p. 6) the District Attorney brought up?

The Court: Sure.

Mr. Stern: The latter thing being we did intend, on the Motion for Disclosure of Informant, to have two brief witnesses if the Court felt it was necessary and if we are not able to stipulate to the substance of what their testimony would be. I didn't think that this would be a big issue of contention. And in fact if it's going to be an issue of contention, then there are numerous other witnesses from out of state who the defense would seek to bring in to testify on these matters. However, since the affidavit itself seems to indicate there was no factual disagreement, I just wanted to make sure I had two witnesses available to cover the point should the Court want to hear testimony.

I would agree with the District Attorney's Statement that one of the witnesses would involve calling the Defendant for a limited purpose. The other witness is the Defendant's son. I did not file any paper formally endorsing the son as a witness. I would concede that readily. I was not aware that was required for the Motion to Suppress, and I apologize to the Court and to

the District Attorney. And if that would raise any inconvenience or in any way affect the outcome of this hearing, I would be open to considering resetting it. But I don't really think that's going to be necessary.

Mr. Romeo: Your Honor, in that regard, the problem (p. 7) I have, any time there's a Motion for Disclosure of Confidential Informant, that's a serious matter. People are kept as confidential informants for obvious reasons, for their safety, things like that, particularly in Mr. Nunez' case. He has charges pending against him on intimidation of a witness on a prior case. He's been —

Mr. Stern: Your Honor, I'd object to that statement. First of all, it's a mere allegation that has not been substantiated. It involves a person who already had testified and whose testimony was not pending, nothing to do with confidential informant. And I don't think that that should have any bearing on this case.

The Court: All right.

Mr. Romeo: Well, the People do, Your Honor. I think it goes to the balancing test and would go to the balancing test involved in any disclosure.

If you are going to attack the veracity of an affidavit, go beyond the four corner — the general test is you stay within the four corners. If you go beyond it, there's certain things you have to do. Under *People v. Dailey,* Brief Times Reporter, Volume VI, page 58, January 25, 1982. the Supreme Court of this state has set out the procedure you must follow in the state of Colorado to attack the veracity. And there are two very explicit, very specific, "you must do's." One, that the Motion to Suppress for a veracity hearing be supported by (p. 8)

one or more affidavits reflecting a good-faith basis for the challenge. Two, must contain specification of the precise statements challenged. And the reason the Court goes on to say that is they want to make sure that these are not filed frivolously or as a matter of course, that there be some good-faith basis. Two, that the prosecution is given a chance to be able to rebut these.

Neither has been complied with in this instance. As such, I don't think the Court should even be hearing anything about veracity hearings or going beyond the four corners in anything beyond what the motion itself states for disclosure of informant. Thus, that's why I say really legal argument is all that's required in this regard.

If the Court decides that for some reason counsel can in fact go ahead with this at this time or at some later time, counsel's informed me that really from his statements that he says the affidavit is correct in what it says. Thus, he doesn't feel he needs any witnesses, but he's going to put them on. I'm not really sure exactly really what it goes to.

He talks to me in one instance that the Defendant says he was on a hunting trip when in the affidavit the confidential informant says Mr. Nunez says he was down in Mexico. If that's the evidence they're going to put on, the affidavit makes it clear that he was out of town — the police agree he was out of town — and made it clear to the magistrate who reviewed the (p. 9) affidavit that he was out of town for some period of time.

Whether Mr. Nunez was on a hunting trip and told the confidential informant he was in Mexico is really not relevant. In fact, Mr. Nunez may have told one per-

son one thing and in fact been doing something else. That really doesn't affect the affidavit. And if that's really all he's going to put people on to testify about, I really don't see any significance in that as far as with the veracity of the warrant or in fact testing it in any fashion. That's really all Mr. Stern has talked to me about as far as testing the veracity, so I'm not really sure that that really has any relevance here today anyway if the Court were to allow him to go ahead.

The Court: What about the allegation by the District Attorney that you didn't meet the tests set forth in *Dailey* which I understand to be the law?

Mr. Stern: Your Honor, the information that led to our wanting a challenge of veracity was obtained subsequent to the filing of the Motion to Suppress. I should have filed an amended Motion to Suppress which I did not do. I don't know what I can say to the Court beyond that except I would request an opportunity to so amend my Motion to Disclose or Motion to Suppress.

Really, Your Honor, the calling into question of the credibility of only one of three confidential informants — there are three confidential informants. One's veracity is being (p. 10) called into question based upon the fact that Mr. Nunez was out of town on a deer hunting trip for the period of time preceding the filing of the affidavit and preceding his arrest. Only one of three confidential informants really describes any criminal conduct to Mr. Nunez particularly. The other two talk about cars, stopping. Perhaps the Court doesn't want to hear this argument and wants me only to address the amending of the motion.

The Court: One problem I have is the affidavit doesn't appear in this file. The search warrant appears in the file. The affidavit, upon which the search warrant is based, doesn't appear in the Court's file.

Mr. Stern: I have a copy, Your Honor.

Mr. Romeo: Your Honor, I also have a copy of the search warrant. In fact this may be the original. If I can tender this to the Court at this time.

The Court: Well, I've got the search warrant.

Mr. Romeo: There's also the affidavit with that.

The Court: Okay. That's what I'm missing here.

Mr. Romeo: In fact that does look like an original.

The Court: Well, I think if you're going to attack the veracity and go outside the four corners, that we're going to have to have compliance with *People v. Dailey*. I'll permit you to amend that. When is the matter set for trial?

Mr. Stern: October 28, Your Honor.

Mr. Romeo: Your Honor, if the Court is going to allow (p. 11) that, if we could have an offer of proof at this time. As I say, from what Mr. Stern has told me so far, I don't really see that as being that relevant as to veracity. He may see it as being relevant. I don't. If he can maybe make an offer of proof as to what these people will testify to.

The Court: Okay.

Mr. Romeo: Maybe that —

The Court: That's fine. Maybe we can get it handled today.

Mr. Romeo: I'd just as soon handle it today if we could.

Mr. Stern: If I may take a moment to explain. Two places in the affidavit — one place, if I may get a copy of the affidavit. It states that the confidential — again, there are three informants involved in this search warrant. Informant No. 1 testifies that numbers of vehicles would park their car, go into the residence, and leave a short time afterwards and also indicates that some license numbers were given. However, who those license numbers relate to and what evidence that is of criminal conduct is not gone into any further. We're not questioning that information from the citizen informant.

The second confidential informant talks about activities of a Pat Nunez on October 3, 1981. And that confidential informant does indicate that he believed Mr. Nunez was out of town at that time.

(p. 12) Finally, the third confidential informant states a number of things. And he is the only individual who allegedly observes Mr. Nunez involved in any criminal conduct. Number one, he says that Mr. Nunez makes a statement that he had just come back from Mexico and had obtained 5 ounces of heroin and had brought it across the border himself. On the second page it says that within the previous two weeks, Mr. Nunez had made deliveries of heroin, driving a motor home and a red Ford pickup truck.

Finally, Your Honor, in the deposition of Sergeant DeNovellis that was taken in another matter which I

only received two days ago, there's testimony that this third confidential informant allegedly made these observations on November 6. And I asked what particular time they were made, and Sergeant DeNovellis claiming an informant's privileges are respected and said he couldn't give me that information but it was on November 6.

We are prepared to put on testimony, and perhaps some guidance from the Court would be helpful because there are numerous other witnesses we could call on this point from out of state, from out of the metropolitan area, and otherwise we couldn't bring today because there wasn't enough time set aside for it. We didn't know if this was a turning point in the Court's determination.

We brought two witnesses who will testify Mr. Nunez (p. 13) was gone the week prior to this, that he did arrive home on the 6th, that he was home on the 8th, and only immediate family were there, immediate extended family, all of whom who could be brought in to testify he was there on the 6th, nobody else was there, and none of these activities was taking place.

And this is the key aspect or the sole element in the affidavit that really ascribes any criminal conduct to Mr. Nunez. And there is abundant case law, Your Honor, that if you can call the credibility or veracity of the informant into question, then that's one basis for requiring the District Attorney to release or disclose the identity of the confidential informant so that person can be called to testify to see if that person's statements that were made to the affiant were accurate.

We're not questioning the affiant's credibility, Sergeant DeNovellis' credibility. It's just whether this—

The Court: I understand.

Mr. Stern: Anyway, it's a crucial point in the affidavit. In a sense, it goes more to the disclosure of the informant so we can then call the informant at the suppression hearing than the Motion to Suppress itself. Again, I apologize. I was not aware of a case, and I simply do conform with the dictates of a case. Your Honor, I have the most recent confidential informant case, the one Judge Quinn did I believe.

The Court: No. Thank you.

Mr. Stern: That is — I have the *Bueno,* and I am (p. 14) referring to the *Bueno-Arhuletta* case.

The Court: I think *Bueno* is the most recent unless there's been one handed down since *Bueno.*

Mr. Romeo: No, not that I know of.

Your Honor, just briefly. From the statements in fact counsel said he's not questioning the officer's truthfulness in this regard. I think if you also look at *Daily,* it's the Defendant's burden to show that a false statement was knowingly, intentionally, or recklessly disregarded by the affiant in the warrant. And if that false statement is used for probable cause and that's established by the Defendant by preponderance of the evidence, then he would have the right to have it stricken and then the Court would still have to look at the four corners.

Here he's not alleging that. And *Dailey* goes on to talk about if the error is an error that's been caused by purjury by the informant or from some other fashion, that's not necessarily the case, it's not necessarily true

that the statement then must be stricken from the record. Only if the Court finds that the officer lied or made an intentional, knowing, or reckless disregard for the truth, then it must be stricken. Otherwise that's not mandated.

That really seems to be the situation that counsel is alluding to, that he's saying the officer didn't make any falsehoods, didn't disregard anything recklessly, but if anything was done, it would have had to have been done by the confidential (p. 15) informant. And as such, I don't think in this regard the Court would have to eliminate it from the warrant and in fact shouldn't eliminate it from the warrant.

The statement he talks about from the informant — first of all, there was from the second informant information received about dealing by Mr. Nunez and dealing heroin. On the third informant, the statement about him being gone, whether he was on a hunting trip or really was in Mexico, really doesn't matter. The affiant says he was told by Mr. Nunez that he was in Mexico. And if Mr. Nunez makes those statements to people, he's stuck with them.

The statement is that in fact he was home within the past 24 hours of the execution of this warrant, and that in fact coincides with what the confidential informant says. On one hand, Mr. Stern says he's going to put on evidence that in fact no heroin dealing went on. Well, in fact we have, once Mr. Nunez is arrested, the evidence of heroin. And although that does not in and of itself make probable cause, I think that substantially weighs against testing the veracity or releasing the name of a confidential informant. I think those are two different tests. The fact heroin is found doesn't support a bad

search warrant. But when you found hereoin just as a confidential informant says it is found, I think that supports the veracity of the confidential informant.

Mr. Stern: If I may respond briefly. My statement (p. 16) about Sergeant DeNovellis — I have no information at this point or presented to the Court he intentionally made any misstatements. I think if we get the confidential informant disclosed and show he was in fact not at the Nunez residence on the 6th, that would cut to the heart on the Motion to Suppress and, second of all, that there was recklessness on the part of the affiant is not verifying the information or checking out the information.

(Pause.)

The Court: Mr. Romeo, I'm not clear as to whether or not you wanted me to consider the offer of proof as being sufficient under *Dailey* to take the place of the affidavits that are required in *Dailey* so as to proceed with a hearing in this matter today. I'll do one of two things. I'll either do that, or I'll permit Mr. Stern an opportunity to amend his Motion to Suppress, furnish the affidavit, giving you the information on which he's going to rely from the witnesses, and set this matter down for another early hearing. Or I'll proceed on the basis of accepting an offer of proof in lieu of an affidavit.

I think the law doesn't favor, as I understand it, the concealing of the identity of informants in situations such as this provided that the defense, according to Justice Quinn's reasoning in *The People v. Bueno,* which is June 21, 1982, Volume VI of the Brief Times Reporter, page 522 — Quinn says, "Our cases generally have

addressed two common situations involving (p. 17) the informer privilege. The first situation involving disclosure arises in connection with a defendant's motion to suppress evidence," which you apparently have here. "If the disclosure of an informant's identity is essential to a fair determination of a suppression motion, then the trial court in its discretion may order disclosure. . . . Disclosure, however, is not automatic upon request. A defendant seeking disclosure must make an initial showing that the informant will provide information essential to the merits of his suppression ruling. . . . (where defendant makes initial showing of good faith basis in fact to question accuracy of affidavit containing recitals of unnamed informant, court may order disclosure of informant's identity). . . ."

It then goes on further to say that "Thus a defendant will meet this initial burden when he establishes a reasonable basis in fact to believe that an informant does not exist or, if he does, he did not relate to the police the information upon which the police purportedly relied as probable cause for an arrest or search."

Now, if I accept the offer of proof that counsel has made in lieu of those affidavits, it seems to me that he's established that.

Mr. Romeo: I don't really think so, Your Honor. I think if you read the last part you read, the last sentence you read — and I don't have exactly where you were reading in *Bueno*. (p. 18) I do have a copy of that.

The Court: It's on page 523 on the far right-hand side of the page about two-thirds of the way down starting, "Our cases generally have addressed . . . ."

Mr. Romeo: All right. I do have that. I think what the Court again talks about — they cite *People v. Quintana* where there is presented to the trial court evidence of the lack of credibility of affiant or his officer-informant.

The Court: I'm not concerned about Detective DeNovellis' credibility. I don't think that's in question at all.

Mr. Romeo: Exactly. And I think that's the distinction the Court makes, that if there's an offer of proof that the confidential informant did not say what the affiant says he said or that the officer recklessly disregarded the truth, then in that situation disclosure is rather important. Here I don't think that's the situation. What they're saying is the informant may or may not have told the truth to the affiant. And I think what *Dailey* makes clear is that's a very different situation. The fact that there may be some inaccuracies of the informant themselves, that goes behind a warrant and as such that material, even if proven, need not be stricken from the warrant. And as such, the Court can in fact consider that in the warrant.

The reason for that is that all the protections of (p. 19) the Fourth Amendment, the neutral detached magistrate, the officer telling the truth as best he knows it, all the protections that the Fourth Amendment can give any citizen, have been complied with. And the fact some person lied to an officer, even assuming arguendo that were true, suppressing evidence or disclosing of an informant really does no good at that point in time. It does not further the ends of the Fourth Amendment particularly in any fashion. It merely subjects con-

fidential informants to disclosure and obvious risk of harm, a risk which we think is very great in these cases.

Thus, I think they're two very different situations where the defendant has to make out his burden by a preponderance of the evidence and not merely just a minimal showing that the officer is lying or recklessly disregarded the truth. And counsel is really not stating that. And the situation that we have here is where he's alleging maybe the confidential informant was either wrong or lied to the officer in some fashion. In that case that would require disclosure of informants every time because every—

The Court: Well, I'm not sure. If it goes to his Motion to Suppress and he's entitled fairly to have that information, I think probably it will.

Mr. Romeo: Well, I think then the rule would literally be any time there's a Motion to Suppress, you would always say, "Judge, the confidential informant said something that (p. 20) wasn't true." Thus, we always get disclosure of the confidential informant.

The Court: If counsel stated to me, and I assume what would be furnished in the affidavit if the affidavit had been furnished, is so and so on information and belief states that on November 6 there was no one present at the Nunez residence except members of the Nunez family and consequently the information that Officer DeNovellis relied upon from the confidential informant, which was alleged to have been obtained on the 6th, could not in fact have been obtained on the 6th—

Mr. Stern: May I respond just briefly? There's two issues I guess. One is have I followed the rules in supply-

ing the affidavits; and if not, does either Mr. Romeo want to rely on my statement or does he want me to furnish the affidavits. The other thing is the merits of the argument they require to disclose or do not require. However, if I could say and point out one very important thing just briefly. Three informants, the second one only —the first one says nothing I would interpret as criminal. The second one says that—well, one, Mr. Nunez is out of town and a party known to this informant as Pat is making sales of heroin for Antonio Nunez. This person later says would be in possession of Mr. Nunez' heroin. It doesn't say Mr. Nunez is saying anything. The only person is this third informant which says three things which we could present evidence I think that would satisfy Your Honor, that would carry the (p. 21) burden that there is a good-faith reason to believe what this person said could not have possibly happened. And, therefore, I think it would be incumbent upon the Court to order disclosure so we could have this alleged informant in court to say, well, I did say this or I didn't say this or I said this and it was changed to this, to find out exactly what did happen. Otherwise, how would a Defendant—

First of all, this is the first time I've ever in any of my criminal cases attacked the veracity of an informant in this way. And I don't know if it's the Court's experience to rule in this case that disclosure as afforded by the law would open up some floodgate of questioning confidential informants. I've never done it before. I don't know what the Court's experience is. All I know is we have a confidential informant or an affiant saying a confidential informant allegedly told him things that

could not have been true. And how else can we prove or get to the bottom of what happened without getting that informant disclosed?

But, again, I'm not asking for the Court to make a ruling on disclosure. Now, if the District Attorney would like me to comply with the procedure and file the affidavits—and I apologize for not doing that.

The Court: That's what I'm trying to find out.

Mr. Stern: Also, Your Honor, I'd add I can get them in as quickly as possible.

(p. 22) (Pause.)

Mr. Romeo: Well, I'm in a difficult position, Your Honor. What I would like is to have the Court obviously rule that the rules weren't followed, the procedure wasn't followed, and the Court is not going to consider that. The Court has preliminarily said the Court is not going to rule that way. And that would be my initial request, that the Court rule that since the procedure has not been followed, the Court is not going to allow the test of veracity of the affidavit. I'd have to admit I'd much rather have the affidavits be filed, but I think I'd like to proceed today on this, get any testimony we have to get.

If for some reason we have to continue this hearing —and I would hope that that would not be the case—I may request of the Court time to present additional evidence. But if we can finish it today, I'd just as soon try and finish it today.

TheCourt: All right.

Mr. Romeo: Briefly in response though. I'd just note the second informant relates that—and the Court

can read it—that Mr. Nunez was actively engaged *in the* sale of heroin at his address, something that's left out every time by defense counsel. But let's not get into the actual argument right now of whether the confidential informant should be released or not released.

Mr. Stern: Your Honor, my problem only is that if (p. 23) the confidential informant is going to be disclosed for the purpose of the Motion to Suppress, I'd like to have that witness be present so he could be questioned. Now, I'd have no problem with taking the testimony of the officers and continuing it for the testimony of the confidential informant should the Court order disclosure.

Mr. Romeo: Well, I can cut that a little short. I think, realistically, Judge, the informant is not going to be disclosed. I really don't want to kid anybody about this, realistically. And that's why these motions are usually filed. The officers fear for the safety of this person. They're not going to disclose him. If the Court in some discretion feels that's appropriate, then in fact we'll have to appeal that. If the Supreme Court decides, yes, in fact that is appropriate, the case will probably be dismissed. And in fact I think that's the whole purpose of filing these motions. In Denver there's a raft of them, and I'm sure there will be a raft of them from now on in this county. But I'm ready to go ahead today and leave it to the sound discretion of the Court once the Court hears the evidence.

The Court: All right.

Mr. Stern: Your Honor, I'm a little unclear at this point. Are we going to have evidence on the motion to disclose informant? Because if the Court rules that the

informant is to be disclosed, we would like the informant to testify at the (p. 24) Motion to Suppress as well—

The Court: Now, I understand that, Mr. Stern. I've heard it four times. Believe me, I've got it.

Mr. Stern: I'm sorry. I'm just not sure what evidence the Court wants to go ahead with at this point.

The Court: Mr. Romeo, what would you be proceeding to do at this time?

Mr. Romeo: Your Honor, it's now the Defendant's burden to go forward, present evidence to give information to the Court as to any challenge to the veracity of the search warrant in this regard and the officer's veracity.

The Court: All right. You may call your witness.

Mr. Stern: Your Honor, if I can make a five-second opening statement. That is on the Motion to Suppress itself. There are two grounds, and one I spent a good deal with already. The second is what I believe to be a warrantless search of the Defendant at his residence which, based upon the fact that it's a warrantless search, I don't believe that we have a burden. I don't have any problem calling witnesses for a practical problem. But when it comes time to rule on that, I believe the burden rests with the People on showing the legality of a warrantless search. However, I'm prepared to call all the witnesses, and we can worry about the burden when it comes time to make a ruling on the case.

The Court: Well, as I understand it, the witnesses (p. 25) you are going to call now would be in the same position as if you'd filed the affidavit setting forth their

names and what it is that you rely upon to go outside the four corners of this affidavit for the search form to support your position that the identity of the confidential informant has to be disclosed. Those are the witnesses I'm prepared to listen to.

Mr. Stern: Not the other witnesses about the warrantless search at this time? I don't mean to—I'm not—

The Court: You may proceed, Mr. Stern.

Mr. Stern: All right. Your Honor, I would call Mr. Nunez to the witness stand for the limited purpose of establishing evidence and request that the Court enter an order limiting the cross-examination into those matters and not into the subject matter of the crime itself.

The Court: All right.

Mr. Stern: Also, at this time I'd move to sequester the witnesses if I could if the Court feels it's appropriate.

Mr. Romeo: That's fine, Your Honor. I'd keep Sergeant DeNovellis as our advisory witness.

The Court: All right. Anyone else who is going to be a witness in this case is sequestered. Please leave the courtroom. Do not discuss your testimony among yourselves or with any other person in this case.

Mr. Stern: Thank you. I'd call Mr. Nunez to the witness stand.

(p. 26) The Court: Mr. Nunez, please come forward. Be seated in the witness chair to my right.
Whereupon,

ANTONIO GUADALUPE NUNEZ

was called as a witness on behalf of the defense and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Stern:

Q. Please state your name and your address.

A. Antonio Guadalupe Nunez, 8690 Norwich Street, Westminster, Colorado.

Q. Mr. Nunez, directing your attention to the fall of 1981, did you have occasion at that time to go on a hunting trip?

A. Yes, I did.

Q. Do you recall the date that you left on the hunting trip?

A. I left October the 31st, on Halloween, about 12 noon.

Q. And who went on this hunting trip with you?

A. My father, Luis Nunez; Albert Gonzales, Shawn Nunez; Javier Rivera; and myself.

Q. What is the relationship of these individuals to you?

A. Luis Nunez is my father. Albert Gonzales is a friend. Shawn Nunez is my son. Javier Rivera is my nephew.

Q. And where did you go on your hunting trip?

A. We go about 14 miles southwest of Hartsel. It's (p. 27) towards the Climax mine or Amax, Climax, either one they call it.

Q. And what vehicle did you take to go on your hunting trip?

A. A 1978 Dodge motor home.

Q. When did you return from the camping trip?

A. I returned on November the 6th early in the morning, about two in the morning, three in the morning, somewhere in there.

Q. Did you catch any deer?

A. No.

Q. Now, while you were up there, did you have an occasion to frequent any bar or cafe in the evening?

A. We usually go to Mrs. Kitty's place. That's what we call it, a lot of deer hunters. We go there almost every night except on Tuesdays. On Tuesdays they're closed.

Q. And did you go to that bar or cafe during this period of time?

A. Yes, I did.

Q. And would there be individuals from that cafe or bar who could come and testify to that fact?

A. Yes, they will.

Q. Now, what did you do after you returned on November the 6th at two or three in the morning?

A. I unpacked the rifles that night—early in the (p. 28) morning, night, what you'd call it. I unpacked the

rifles, took them in the den, and put them in the closet and made sure every bullet in the—the rifles were empty and everything. I left some sleeping bags in the motor home. Rifle cases I had left in the motor home. And I did unpacking. And then after that, I took my shower and—staying up there seven days, you smell quite a bit. You have to sponge bath in the stream. So I took a shower, bathed, stood in the bathtub for about an hour and a half, and then laid down and watched TV. I was exhausted.

Q. And did you subsequently fall asleep?

A. I fell asleep.

Q. And when did you wake up, if you can recall?

A. I would say about 4 o'clock that afternoon.

Q. That would be the afternoon of the 6th?

A. Right.

Q. Were your kids home all day on the 6th?

A. Yes. My boys were home. My boy, Shawn, was home. And Javier, my nephew, was home.

Q. And they did not go back to school the Friday after returning from the camping trip?

A. They did not.

Q. And during the day on that Friday, did anybody come visit you?

A. Nobody.

Q. And that night did anybody come visit?

(p. 29) A. Only my relatives.

Q. And which relatives were they?

A. My sister-in-law, Angela; my mother-in-law, Marty; my brother-in-law, Mike; my nephews and nieces came over, my father and my mother came over to the house that night.

Q. And what was the purpose for their coming over?

A. It's just to see how everything went, deer hunting, and see if we did bring any meat to share the deer with them or elk.

Q. And would each and every one of those individuals be willing to come—

Mr. Romeo: I'm going to have to object to this line of questioning, Your Honor. It's totally irrelevant.

The Court: I'll sustain the objection.

Q. (By Mr. Stern) Did you at any time during this period of time travel to Mexico?

A. No.

Q. Did you ever at any time during this period of time tell anybody you were traveling to Mexico?

A. No, I haven't.

Mr. Stern: One moment, Your Honor. (Pause.) I have no further questions, Your Honor.

The Court: All right.

Cross-Examination

By Mr. Romeo:

(p. 30) Q. Mr. Nunez, have you ever been convicted of a felony?

A. Yes, I have.

Q. Would you please tell the Court what felonies you've been convicted of.

A. It was conspiracy of a counterfeit obligations through the federal court.

Q. When was that conviction, sir?

A. That conviction was back in 1979, I was convicted and sentenced in 1980 of—January the 9th of 1980. I took myself into Arizona, federal camp, turned myself in to the federal camp, and committed myself in there.

Q. And when were you released from—

A. I was released as—officially I was released July the 12th of 1980 into a half-way house.

Q. Are you still on parole for that offense?

A. No. As far as—not that I know of.

Q. Have you ever been convicted of any other felonies?

A. Of what? Pardon?

Q. Any other felonies?

A. Well, I was convicted of a speeding, careless driving—

Q. No. Felonies, Mr. Nunez.

A. I don't know—a simple assault. Is that a felony? That's when I was 16, 17 years old.

Q. Let me ask you this: Do you remember in 1966 in (p. 31) Greeley, Colorado, being convicted of burglary and receiving two years' probation?

A. That's when I was 15, 16 years old. Yes, I remember that one.

Mr. Stern: Your Honor, if that was a juvenile offense, I'm going to object—I don't think it's a proper basis for cross-examination. I ask that it be stricken.

The Court: I don't know whether it was or wasn't.

The Witness: That was a juvenile offense.

Mr. Stern: If I may voir dire on that, Your Honor?

Mr. Romeo: Well, if I could finish.

Q. (By Mr. Romeo) Were you convicted in adult court? Do you know?

A. Only as a—with the federal department.

Q. Let us ask you this: Do you remember in 1970 being convicted under 8 U. S. C. 1325 of illegal entry and receiving five years' probation with supervision?

A. That was a misdemeanor.

Q. That was a misdemeanor and you received five years?

A. Yes, it was.

Mr. Stern: Your Honor, again I ask that be stricken since misdemeanors aren't proper.

The Court: Well, a misdemeanor that carries five years of probation sounds a lot more like a felony to me than—

The Witness: Your Honor, it was a misdemeanor. And (p. 32) my probation officer was Richard Tinsley in the United States federal court and which I have worked

closely with him during that time. It's strictly a misdemeanor. That's what they said down in Texas. I was in El Paso, Texas, and it was considered a misdemeanor, aiding and abetting aliens.

The Court: All right. I don't know.

The Witness: They gave me the youth act. That's why. Six months, six years. Instead of that, they gave me five years of probation. And I did—I did—I was let out early. I did four years under that, and they gave me one year for good—for doing real good. And that's what happened.

Q. (By Mr. Romeo) So you actually did four years?

A. On probation, yes.

Q. Oh, you did four years of probation?

A. Yes.

Q. You were convicted under the Youthful Offenders Act?

A. Yes. At the time. With five years of probation.

Q. Sounds like felony to me. All right. Mr. Nunez, you've been previously arrested for sale of heroin; is that correct?

Mr. Stern: Your Honor, again I'm going to object to arrests that have not resulted in convictions for not being proper for cross-examination.

Mr. Romeo: I think in this case it is, Your Honor. Here the veracity of this Defendant is at issue. This Defendant (p. 33) is saying, hey, I never sold any heroin,

never had anything to do with any heroin. For this limited purpose in this limited situation, I think it's appropriate. I think it goes to his motives for testimony, his actions, and I think the Court can judge his credibility. In fact I think it is appropriate in this particular instance.

The Court: I'm not sure that evidence of conviction of anything other than a felony is admissible. I'll sustain the objection.

Q. (By Mr. Romeo) Mr. Nunez, you are currently and probable cause has been found on an intimidation of a witness case; is that not correct?

Mr. Stern: Same objection. No conviction.

Mr. Romeo: Your Honor, again here—

The Court: Well, I'm concerned about that enough that I'll permit that.

Mr. Romeo: Thank you, Your Honor.

Q. (By Mr. Romeo) Mr. Nunez, isn't a fact you've had a preliminary hearing and been bound over to the district court on an intimidation of a witness case?

A. Well, as far as to me, you would have to discuss that with my other attorney, Joe Saint-Veltri.

Q. You're in the district court; is that not true?

A. You would have to discuss it, okay, sir, with Joe Saint-Veltri.

(p. 34) Mr. Romeo: Your Honor, I ask the Court to order him to—

The Court: Answer that, Mr. Nunez.

A. (By the witness) Yes, I'm bound.

Q. (By Mr. Romeo) You're in the district court in that case?

A. Yes.

The Court: He's answered "Yes."

Q. (By Mr. Romeo) You're set for trial on that case?

A. Yes.

Q. That was intimidation of a witness on your prior heroin sale case?

Mr. Stern: Your Honor, I would have to object—

Q. (By Mr. Romeo) The wife of the witness to your heroin sale case?

The Court: I think we've gone far enough.

Mr. Stern: I represented the other. This has nothing to do with any case of Mr. Nunez. It has to do with the brother of Mr. Nunez.

Q. (By Mr. Romeo) Your brother is Juan Nunez?

A. Yes.

Q. You're familiar with a person by the name of Kathy Ontiveros?

A. Yes.

Q. You're aware she's a heroin addict?

(p. 35) A. I guess so.

Q. She possesses heroin?

A. Pardon?

Q. She possesses heroin from time to time?

A. I don't know. I don't live with her.

Q. You're aware she's been convicted of possession of heroin?

A. I know she went to court on it and that's all.

Mr. Stern: Can I ask what the relevance of Kathy—

Mr. Romeo: We'll get to it right now.

Q. (By Mr. Romeo) Kathy Ontiveros came over to your house on November 7; is that not correct?

A. Probably—yes. She came on the 7th, right?

Q. Yes, she did. And the officers were there?

A. Right.

Q. You returned November 6 at 2 a.m. in the morning?

A. Right.

Q. And you were there the whole day?

A. Right.

Q. You said other people came over to your house?

A. Relatives, yes.

Q. Those are other people, are they not, Mr. Nunez?

A. Right.

Q. They are not your immediate family, your wife or children?

(p. 36) A. Immediate family to me is all my relatives, immediate family.

Q. Mr. Nunez, the people that came over were not merely your wife or children?

A. My wife and children were there.

Q. But other people came over?

A. My mother-in-law came over, my father came over, my mother came over.

Q. And who else came over?

A. My sister-in-law came over, my nephews and nieces came over, and my brother-in-law came over.

Q. All these other people came over to your house; isn't that right?

A. All these people came over.

Q. How old is your brother-in-law?

A. Michael Torres is about 29.

Q. Your sister-in-law?

A. She's about 24.

Q. Nieces and nephews, how old are they?

A. 8, 7, and 9. And my nephew lives with me. He's 15.

Q. Mr. Nunez, if you were working on any heroin at that time, those people may have seen you; isn't that right?

A. Pardon?

Q. If you were working on heroin at that time, those people may have seen you?

(p. 37) A. Rephrase your question.

Mr. Stern: Your Honor, I think that assumes a fact not in evidence.

The Court: I don't think it does. I think—

Q. (By Mr. Romeo) Mr. Nunez, if you were working on heroin, those people may have seen you?

A. What do you mean by that?

Q. Exactly what I said, Mr. Nunez.

A. I really don't know what you're trying to say.

Q. Do you know what heroin is, Mr. Nunez?

A. No, myself.

Q. You have no idea what heroin is?

A. No. I only know it by TV, television, newspapers.

Q. You haven't heard the word?

A. And whatever. Articles I read about, yes.

Q. So you deny that you had heroin on November 7 when the officer took it out of your pocket?

Mr. Stern: Your Honor, I'm going to object now. We're right in the merits of the case.

The Court: You're right. We're beyond the scope of this hearing.

Mr. Romeo: Your Honor, I think this is as appropriate and proper—as I talked to the Court before, what

they want to do is they said to get a confidential informant's name, and they want it hopefully so the case will be dismissed in this (p. 38) particular instance. I think the Court always knows it's very easy to get out and say, no, I've never had heroin. I think we have a right in this instance to go into the fact that in fact he was arrested, he possessed heroin the next day. If he wants to deny it, fine. But I think that's appropriate in judging whether a confidential informant's name should be released when Mr. Nunez says I know nothing about heroin, I know nothing at all about it, the confidential informant is lying when he says the day before I was possessing it, working with it.

I think the Court can look at that circumstance and use that in its determination as to whether this is really a situation where the Defendant needs to have the confidential informant's name released or not. And I think in that regard, it's appropriate to go into it. It may not be used in other motions hearings for direct evidence. If he wants to admit, yes, I possessed the heroin but your search was illegal, we may not be able to use that as direct evidence in our case if he does admit that. But I think it's an appropriate area to go into.

Mr. Stern: Your Honor, I'm sorry I wasn't faster on my feet. I move to strike the statement of do you know what heroin is, to begin with. I think that goes to the heart of the case also. I was just not quick enough on my feet, and I move to strike that and renew my objection to this question. Your Honor, we're prepared, if the Court feels it's appropriate (p. 39)—we felt we needed to make a good-faith showing only. And the only purpose of this testimony is to show that on November 6, the date when allegedly this confidential informant saw these

things, that the only people who came to Mr. Nunez' house were these immediate relatives.

If the Court thinks it's appropriate, we would have no problem and would bring each and every one of them in front of the Court at the Court's convenience and District Attorney's convenience to say that they were the only individuals there and their family and none of them were confidential informants or anything else and none of them saw any of these things going on. I just thought we had to make a very simple showing which we're attempting to do, not to get into the facts of the case, Your Honor.

Mr. Romero: Your Honor, counsel's statements are not evidence. If he wanted to put them on, he should have had them here. His statements are not the equivalent of evidence. *Dailey* makes that very clear, and the Court cannot consider that for any purpose in saying, well, we would have brought them in. The Court cannot consider that.

The Court: Well, I'll sustain the objection made by Mr. Stern.

Mr. Romeo: All right.

Q. (By Mr. Romeo) You were there from 2 a.m. on all through November 6; is that correct?

(p. 40) A. All through November 6.

Q. Spent the whole day there?

A. Spent the whole day.

Q. And you were there the 7th; is that correct?

A. Pardon?

Q. You were there the 7th; is that correct?

A. The 7th I was there until I was picked up. My house was demolished, destroyed.

Q. Mr. Nunez, you have a civil suit filed against all the officers involved in this case; is that not correct?

Mr. Stern: Your Honor, I'd just like some statement of relevancy about the federal case that has been filed by Mr. Nunez.

The Court: I'll overrule it. I don't think it's particularly relevant, but I'll permit it.

Mr. Romeo: Thank you.

Q. (By Mr. Romeo) You filed a civil suit; is that correct, Mr. Nunez?

A. No, I haven't.

Q. Who's filed that?

A. My wife and my children.

Q. You've not filed that?

A. I have not.

Q. Why is that?

Mr. Stern: Your Honor, objection.

(p. 41) The Court: Well, there's no reason to go into that.

Q. (By Mr. Romeo) Mr. Nunez, isn't it a fact you've told various people that you intend to get the confidential informant in this case?

A. No, I haven't.

Q. Isn't it a fact you told people that in fact you'd gone to Mexico to buy heroin, in fact transported it yourself?

A. I cannot leave the state of Colorado.

Q. Mr. Nunez, the question was: Didn't you in fact tell people that though?

A. No, I haven't.

Mr. Romeo: I have nothing further, Your Honor.

Mr. Stern: Your Honor, I'd call Sergeant DeNovellis for two quick questions.

The Court: Thank you, Mr. Nunez.

(Witness excused.)

The Court: Sergeant DeNovellis, if you would be seated in the witness chair, please.
Whereupon,

DON DeNOVELLIS

was called as a witness on behalf of the defense and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Stern:

Q. Sergeant DeNovellis, I want to ask you two quick (p. 42) questions about the third confidential informant we've been talking about without—I don't want you to divulge his name or identity. We've asked you these questions once before and you felt you were able to answer these questions without divulging the identity of the in-

formant. If you feel there's a question, please talk with the District Attorney before answering the question.

The observations allegedly made by that third confidential informant that formed the basis of your affidavit that Mr. Nunez was seen doing certain things within 24 hours of November 7, that confidential informant made those observations on November 6; isn't that correct?

A. That's correct.

Mr. Stern: I have no further questions.

The Court: All right.

Cross-Examination

By Mr. Romeo:

Q. Detective DeNovellis, the statement about Mr. Nunez going to Mexico which you describe in your affidavit, just briefly go over for the Court what in the affidavit the confidential informant told you.

A. Well, the confidential informant reported to me on November 7 that Mr. Nunez had told him that he had went to Mexico.

Q. Did the confidential informant ever say that he (p. 43)personally knew that Mr. Nunez had gone to Mexico?

A. No. Just what Mr. Nunez had told him.

Q. And is that what you put in the affidavit?

A. Yes, sir.

Q. Did the information given to you by the third confidential informant coincide with the information you

received from a citizen informant and the second confidential informant?

A. Yes, it did.

Q. Sergeant DeNovellis, are you aware of any deaths that have occurred at the Nunez household?

Mr. Stern: Your Honor, I'm going to object. I don't know what the relevance of that is, but——

The Court: I'll permit it to proceed. I assume that relevance will be tied up.

Mr. Romeo: I'll tie it up very shortly.

Q. (By Mr. Romeo) Are you aware of any deaths that have occurred at Mr. Antonio Nunez' house?

A. Yes, sir.

Q. Have you any information that they are drug-related?

A. Yes, sir.

Q. Would you please explain that to the Court as to when these occurred and what the relationship to drugs is.

A. That Mr. Pat Torres has died of an overdose of morphine or heroin in the residence of Mr. Antonio Nunez.

Q. And approximately when was that?

(p. 44) A. The exact time and date I don't recall. It was after the execution of the search warrant.

Mr. Romeo: I have nothing further of Sergeant DeNovellis at this time, Your Honor.

Mr. Stern: Just two questions, Your Honor.

The Court: All right. Thank you.

Redirect Examination

By Mr. Stern:

Q. Isn't it true that the person who died was Pat Torres? Is that correct?

A. That's correct.

Q. And the death occurred some six, eight, ten months after the execution of the search warrant; isn't that true?

A. Was it that long? I don't recall the date, sir. I'm sorry. I don't recall what date.

Q. Wasn't it approximately six months after the execution of the search warrant?

A. I don't really know. I testified I don't know what the date was.

Q. But it was more than just a week or two?

A. Yes.

Q. It was a substantial period of time?

A. I'm sorry—

Q. And that was the same Pat Torres the Affiant No. 2 said who was selling heroin?

(p. 45) A. That's correct.

Q. And prior to the time that you prepared this affidavit and prior to the execution of the search warrant which both occurred on the same day, you had no idea of any relative relationship between this Pat Torres and Mr. Nunez; isn't that correct?

A. Well, prior to—

Q. Prior to the execution of the search warrant.

A. Oh, yes. We knew that Pat—a party named Pat had been staying at the residence.

Q. But my question is: You had no idea that that person was the brother-in-law of Mr. Torres prior to the preparation of your affidavit; isn't that correct?

A. I think we learned on the 4th or 5th that it was Pat Torres that they were talking about. But the relationship, no, I didn't know.

Q. The relationship between them, the blood relationship or in-law relationship, you didn't know until long after the affidavit or until after you prepared the affidavit?

A. That's correct.

Mr. Stern: No further questions.

Recross-Examination

By Mr. Romeo:

Q. It was described in the affidavit, was it not, Sergeant DeNovellis, that Pat was selling Mr. Nunez' heroin? Is that (p. 46) correct?

A. That's correct.

Q. And that Pat was driving Mr. Nunez' vehicle; is that correct?

A. Driving the car that listed to Mr. Nunez, yes.

Q. And you checked that out, whether in fact it did list to Mr. Nunez?

A. That's correct.

Q. And in fact it did; is that correct?

Mr. Stern: Your Honor, I'm going to object. The District Attorney is now going outside the four corners of the affidavit. If that's proper, then I'll—

Mr. Romeo: It's described right in the affidavit, Your Honor. I think you can read it right in there.

The Court: Yes. I'll overrule the objection.

Q. (By Mr. Romeo) And you checked that out; is that a fact?

A. Yes.

Q. And in fact it did list Mr. Nunez at the Norwich Street address?

A. Yes.

Q. And that Pat was going to be selling Mr. Nunez' heroin until Mr. Nunez returned to town?

A. That's correct.

Mr. Romeo: I have nothing further at this time.

(p. 47) Mr. Stern: May I ask just a few more questions, Your Honor?

The Court: Okay. We're not going to do this all afternoon, folks. Go ahead.

Further Redirect Examination

By Mr. Stern:

Q. There's nothing in the affidavit that establishes it was Mr. Nunez' heroin? All there was in the affidavit is the statement that was just read to you?

A. That's correct.

Q. And there's no statement in the affidavit that Mr. Nunez was selling or actually possessing any heroin other than the statement it was Mr. Nunez's heroin without any further description?

A. Well, the informant had said that a party named Pat was holding and selling Mr. Nunez' heroin while he was out of town. That's the basis of that.

Q. But there's nothing in that statement that Mr. Nunez had any heroin in his possession or was selling any heroin on November 3 when the confidential informant made his observations?

A. I'm trying to answer you as honestly as I can, but I'm kind of lost. The informant said that Mr. Nunez was actively engaged in heroin out of his residence on Norwich Street but that Mr. Nunez was gone out of town and while he was out of town, a party named Pat living on 33rd and Irving had Mr. Nunez' heroin (p. 48) and was distributing it there.

Q. But there's nothing in that affidavit wherein Informant No. 2 we're talking about now says he saw Mr. Nunez possessing this heroin or selling this heroin?

A. No.

Mr. Stern: No further questions.

The Court: Thank you, Detective DeNovellis.

(Witness excused.)

Mr. Stern: Your Honor, we'd call Shawn Nunez. If I might go get him.

The Court: Shawn, come forward and be seated in the witness chair to my right, please. Raise your right hand, please. You do solemnly swear under penalty of perjury the testimony you give the Court would be the truth, the whole truth, and nothing but the truth?

Shawn Nunez: I don't understand that. You said it too fast.

Whereupon,

SHAWN NUNEZ

was called as a witness on behalf of the defense and, having been first duly sworn, was examined and testified as follows:

The Court: How old are you, Shawn?

The Witness: 12.

The Court: Do you understand that oath that I just gave you?

(p. 49) The Witness: (Witness nods head.)

The Court: What does it mean?

The Witness: It means not to lie.

The Court: What happens if you do lie?

The Witness: You'll be punished.

The Court: How?

The Witness: (Witness shrugs.)

The Court: Do you know?

The Witness: (Witness shakes head.)

Mr. Stern: Your Honor, as an offer of proof, this witness will just corroborate the same testimony as Mr. Nunez about the dates of—

Mr. Romeo: I'm going to object about going into offers of proof. That's why we have sequestration.

Mr. Stern: I'm sorry, Your Honor.

The Court: All right. What grade in school are you in, Shawn?

The Witness: Seventh.

The Court: Where do you go to school? Shaw Heights?

The Witness: Yes, I do.

The Court: If you don't tell me the truth today, do you know that I have the authority to punish you for that if I find out about it?

The Witness: Punish me?

The Court: If you don't tell me the truth today, do (p. 50) you know that I have the authority to punish you for lying to me?

The Witness: I don't know what "authority" means.

The Court: Do you know that I can punish you for lying to me, I can lock you up in jail for a long time?

The Witness: I didn't know that.

The Court: I'm not sure that Shawn understands the oath.

Mr. Stern: I'll withdraw the witness.

The Court: Pardon me?

Mr. Stern: I'll withdraw the witness at this point.

The Court: Thank you, Shawn. You may step down. Thank you for your statements.

(Witness excused.)

Mr. Stern: Your Honor, at this point in time we have no further witnesses. If my understanding of what our burden of proof is at this point in time is correct, I would request a continuance to bring in the other individuals that were there on the 6th, all of whom will testify as I indicated.

The Court: We were proceeding on the basis there wouldn't be a continuance in this matter, and that's the basis in which we're going to proceed.

Mr. Stern: Fine. I have no further witnesses.

The Court: Any witnesses, Mr. Romeo?

Mr. Romeo: I'd call Jeff Reutz.

(p. 51) The Court: Do you have any objection to Shawn Nunez being in court?

Mr. Romeo: Not at this time, Your Honor, since he's not going to be testifying. And I assume he's not going to be testifying at trial.

The Court: I'm not going to permit him to if he—

Mr. Romeo: All right.

The Court: Would you please come forward, sir, and be seated in the witness chair to my right.

Mr. Stern: Your Honor, I have no idea whether he will testify at trial or not. He certainly won't testify today, so I'll have him go sit outside.

The Court: All right. Raise your right hand, please. Whereupon,

JEFFREY E. REUTZ

was called as a witness on behalf of the People and, having been first dudly sworn, was examined and testified as follows:

Direct Examination

By Mr. Romeo:

Q. Please state your name, spelling your last name for the record.

A. Jeffrey E. Reutz, R-e-u-t-z.

Q. What's your occupation, sir?

A. I'm a detective with the Major Peddler Unit of the Denver Police Department.

(p. 52) Q. What is the Major Peddler Unit?

A. It's a unit within the Narcotics Bureau which is essentially geared to target persons that are felt to be major narcotics dealers and to do conspiracy and long-term investigations.

Q. Are you familiar with an Antonio Nunez?

A. Yes, sir, I am.

Q. Do you see him in the courtroom today?

A. Yes, sir, I do.

Q. Could you point him out by where he is.

A. Mr. Nunez is seated at the defense counsel table to the immediate left of Mr. Stern.

Mr. Romeo: Your Honor, I ask the record reflect the witness has identified the Defendant.

The Court: Surely.

Q. (By Mr. Romeo) On November 7, 1981, did you have an occasion to obtain narcotics from Mr. Nunez?

A. Yes, sir, I did.

Q. Where did you obtain those from him? How did you obtain those from him? Just briefly from where?

A. It was inside his residence, and it was on Mr. Nunez' person in the right pocket of a pair of sweat pants that he was wearing.

Q. And could you describe what you took from him from that right pocket.

A. Yes, sir. There was an amount of cash in that pocket (p. 53) along with what appeared to me to be a bread wrapper. And within that bread wrapper were 15 rolled and tied balloons which ultimately proved to contain heroin.

Q. The packaging that you saw in his pocket—how long have you been a narcotics officer?

A. I've been involved in narcotics investigations for about four years.

Q. The packaging that you saw in Mr. Nunez' pocket on that date, what did that tell you about that person?

A. In my experience, I found that particular mode of packaging—in other words, the rolled and tied balloon—is consistent with the way people involved in the trafficking of heroin package heroin to be sold either to street dealers or to users.

Q. Why, for the Court's information, is it rolled and tied in balloons?

A. Well, there's a number of reasons, one of which is that the standard amount sold at that level is something near a gram or less and that fits conveniently in the bottom of the balloon and can be tied and rolled. And I think probably the primary reason is that the balloon material is nondigestible. And I've seen in many instances a person will retain the balloon with the heroin in his mouth or swallow the balloon in the effort to secret the heroin. And it can, therefore—since the balloon is nondigestible, it can therefore be recovered at a later time.

Q. Is that 15 balloons that you found inconsistent with (p. 54) personal use?

Mr. Stern: Your Honor, I would object to the question without more of a foundation.

The Court: Oh, I'll overrule the objection.

Q. (By Mr. Romeo) In your experience, Officer?

A. Yes. In my experience that would be inconsistent with personal use.

Mr. Romeo: I have nothing further of this witness, Your Honor, at this time.

Mr. Stern: I have no questions.

Mr. Romeo: For the veracity hearing.

The Court: Officer, from the 15 balloons that you seized, you have expected to have yielded about 15 grams of—

The Witness: Well, at one time an individual balloon or bag, as it is commonly referred to, on the street used to contain a gram of heroin. In recent years we've seen that quantity diminish somewhat. And it now runs I would say, just roughly as an average, between .6 and .8 grams.

The Court: Okay. Does counsel have any questions based on the questions I asked?

Mr. Romeo: Just one.

Q. (By Mr. Romeo) Do you remember approximately how much this did end up weighing out to be?

A. No, sir, I don't. I have seen the lab analysis report, but I don't recall the specific number.

(p. 55) Q. If I showed you that, would that refresh your memory possibly?

A. Yes, I believe it would.

Q. If you'l just tell the Court what you're examining right now.

A. What I have in front of me is the evidence examination report which was received from the Denver Police forensic laboratory. And it has the report of the chemical analysis and examination done on the 15 balloons when we submitted it to the lab. The results of the test which was performed by Detective Mark Owen, who's one of the chemists in the lab, was that he found the powder which was contained in each one of the balloons to be heroin, and he found a total net of 9.6 grams.

Q. Does that change your opinion, the 9.6 grams, in any way as this being for personal use or for sale?

A. No, sir, not at all.

Q. And thus your opinion with the 9.6 grams packaged in this fashion would be—what?—was this for sale or for personal use?

A. My opinion is that it would be for sale.

Mr. Romeo: Nothing further, Your Honor.

The Court: Thank you, Mr. Romeo.

Thank you, Officer.

(Witness excused.)

Mr. Romeo: I have no further witnesses at this time, (p. 56) Your Honor.

The Court: All right.

Mr. Stern: I have nothing further on this issue, Your Honor.

The Court: All right. I'm prepared to rule upon the Motion for Disclosure of Confidential Witnesses without further argument. If counsel wishes to make argument, they're welcome to do so.

Mr. Stern: Your Honor, we move for disclosure on two bases, one for the purpose of the Motion to Suppress and the other for the purpose for use at trial which are two separate matters. We believe that this witness would be able to give relevant evidence as to whether or not Mr. Nunez did possess heroin and, if it's within the confines within that same decision, the *Bueno-Archuletta* decision, on the use of a confidential informant at trial. I don't know if the Court wants further argument on that. I'd just point that out to the Court.

The Court: Thank you, Mr. Stern.

Mr. Romeo: Your Honor, I'll try to be brief. I don't want to prolong this thing any longer than necessary, but I do find this to be a particularly important decision. I think the Court realizes people are kept confidential for many reasons. Your Honor, in this particular situation, we have a situation where they're not saying that the officer lied or that he had a reckless disregard for the truth. They're saying that the (p. 57) informant may have related information which was untrue.

I think under *Dailey,* what *Dailey* says on page 61 of the Brief Times Reporter previously cited, "If the source of the error is intentional falsehood or reckless disregard for the truth on the part of the officer-affiant, the statements must be stricken from the affidavit . . . if, on the other hand, the error has some other source we leave to the trial court the initial resolution of the consequences . . ." citing the other cases in this particular instance. The burden of proof, " . . . the defendant can show by a preponderance of the evidence that the error in the affidavit for search warrant was caused by an officer-affiant's perjury or reckless disregard for the truth."

And in this particular instance, there's no allegation of that. There's no evidence to that. In fact all the evidence shows Mr. Nunez was home the whole day. Thus, there's no dispute that in fact the confidential informant could have seen exactly what he saw.

The argument by defense counsel implied that, well, the relatives were there. They may be the confidential in-

formant, one of those people. We're not going to say who the confidential informant is.

Mr. Nunez has a prior felony conviction, I suspect more than one prior felony conviction, although it may only be one. There are lawsuits, civil lawsuits, pending. Mr. Nunez (p. 58) has an intimidation of witness case pending against him. In looking at a balancing test in this regard, I submit the balance does not go to the Defendant in this particular instance.

As to the trial on the merits, the confidential informant is not a witness. This is a warrant case, and items were seized at the residence. That's the basis for the prosecution. Unless we were to endorse the confidential informant as a witness and put them on as to the trial, they're definitely not entitled to that. I submit in this particular instance, they're definitely not entitled to the disclosure of the confidential informant here.

The Court can see by looking at the affidavit, the second confidential informant, the one they're not even contesting, states—and it's stated in the warrant that Antonio "Pic" Nunez, the confidential informant stated, was actively engaged in the sale of heroin, that this "Pat" was dealing Mr. Nunez' heroin, in fact that was confirmed, and confirmed by the Defendant, yes, he was out of town, he was using Mr. Nunez' vehicle, confirmed by the officer as stated in the affidavit. These things were confirmed which support what the third confidential informant says, the arrest of Mr. Nunez, the finding within 24 hours of what the confidential innformant says was the cutting and processing of heroin, finding in fact heroin on him packaged for sale.

Your Honor, I submit that they have not made their (p. 59) burden in this case, a burden which is even stronger since alls they can allege is that possibly the confidential informant may not have related things truthfully. The two things they say he did not relate truthfully is, one, is Mr. Nunez states he never told anyone he went to Mexico to get heroin. The confidential informant, if his name was released, says, yes, he did tell me that. Your Honor, even if you strike that from the affidavit, probable cause does not fall.

Secondly, that the confidential informant saw him processing some heroin the day before. Here we have the evidence. He's arrested within 24 hours. He's in fact caught with heroin. I submit that rebuts the Defendant's evidence that he knows nothing about heroin, has nothing to do with heroin, no one had nothing to do with heroin on the 6th.

Your Honor, I submit they've not met their burden. Even if they have, when the Court applies the balancing test, this confidential informant's name should not be released.

The Court: That's all. The Court's heard the testimony of the various witnesses who have testified in this matter. The Court has reviewed the cases the Court believes to be applicable to this situation, *People v. Dailey* and *People v. Bueno*.

In reviewing the affidavit for the search warrant which was issued by Judge Carelli, the Court finds that the probable cause to issue that search warrant must have been established by the information contained in the

third or fourth paragraph (p. 60) on the search warrant as it relates to the third informant, the third confidential informant. The Court is not at all sure that probable cause can be shown simply by the first two confidential informants in this situation. The Court finds that the confidential informants go to the Motion to Suppress.

The Court has a great deal of trouble with revealing the evidence, revealing the identity of the confidential informants, because the Court understands what happens to confidential informants whose identity is revealed. They are quite frequently the subject of, at the very least, harassment. However, the Supreme Court of the United States inn the case of *Roviaro v. United States* states very clearly, "'Where the disclosure of an informant's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way. In these situations the trial court may require disclosure and, if the Government withholds the information, dismiss the action.'"

I don't think the Court has any choice. I'll find that the Defendant has made a showing that the identity of the confidential informant is required to fairly meet the determination of the motion to suppress evidence; further, that it's probably just as necessary for the trial of this case, the identity of that particular informant.

It doesn't give the Court a great deal of pleasure (p. 61) to make that ruling. It would seem to the Court, just as a comment on this case in general, for the government to take the position that rather than disclose the confidential informant they'll submit to a dismissal of this case, in a case of this magnitude it certainly

seems to the Court to be wrong. Everybody in this world is at risk at one time or another. People in the drug trade are as much at risk as other people. I hate to see the effort to prevent the sale of this type of material hampered because we're going to protect the identity of some confidential informants. But it's the choice that the People have to make in this case. I'll order the disclosure of the identity of the confidential informant.

Mr. Romeo: Would the Court give us 10 days to make a final determination as to whether or not—

The Court: Absolutely.

Mr. Romeo: And for possible interlocutory appeal procedures to follow after that?

The Court: Absolutely. Let's do this. The matter is set for trial when, Mr. Romeo? I'm sorry. I didn't check it.

Mr. Stern: I believe, Your Honor, October 28.

The Court: October 28?

Mr. Stern: If I can double-check.

The Court: If the People are going to disclose the confidential informant to the defense, that has to be done on (p. 62) on or before September 24, 1982. If it's done then, that will also serve as a setting date for the Motion to Suppress, 8:30 a.m.

Mr. Stern: On the 24th, Your Honor?

The Court: On September 24.

Mr. Romeo: Your Honor, does the Court wish to make any further findings of fact as to how the dis-

closure of the informant is relevant as to the trial on the merits versus the Motion to Suppress at this time in that he's not an eye or ear witness to the charge?

The Court: It seemed to the Court it was not a perceiving witness.

Mr. Romeo: No, it's not. The charge of possession of heroin on the 7th day of November, 1981, the only time the informant sees Mr. Nunez with heroin is on the previous day, the 6th, and that information is related to the officer. And this is a prosecution which continues only, as many other cases have—in fact I think it's *Bueno* in fact itself—

The Court: The only concern with Mr. Nunez' possession of the heroin is on November the 7th; is that correct?

Mr. Romeo: Yes. When Officer Reutz says, he testified, took the heroin from him out of his pants pocket.

Mr. Stern: Your Honor, if I could make a statement why we felt it was relevant in trial, if the Court would like to hear that at this time.

The Court: Sure.

(p. 63) Mr. Stern: We felt it was relevant if we could show this information was somehow fabricated, that it would tend to show that perhaps Mr. Nunez was not in possession of heroin on that date since it will be solely a credibility contest between Mr. Nunez and the officer whether he did or did not possess it at that time. That's on the issue of the trial.

The Court: If that's correct, the Court misunderstood the thrust of the information in the affidavit, and

the Court will not order the disclosure of the confidential informant on the basis that he would be a necessary witness at the—necessary for the trial of the matter, simply the suppression motion.

Mr. Romeo: Your Honor, I assume also by the Court's ruling, it's initially also stating that the Court is denying our motion from the initial start—to deny our motion not to even hear the veracity hearing because of failure to comply with the rules.

The Court: That's correct. It was my understanding —and this is what I was trying to get at at the very beginning. Oh, yes, all right. Oh, I see what you're saying. Yes.

Mr. Romeo: Although once the Court ruled that way, we didn't waive our objection by going ahead today to that initial objection.

The Court: Sure.

Mr. Romeo: Thank you, Your Honor.

The Court: Anything further?

(p. 64) Mr. Romeo: Nothing further at this time.

The Court: Court will be in recess.

(Whereupon, the proceedings were concluded at the hour of 4:34 p.m.)

(p. 65) JUDGE'S CERTIFICATE

I, PHILIP F. ROAN, Chief Judge of the District Court in and for the County of Adams, State of Colorado, who presided at the hearing of this cause, hereby certify the foregoing to be all the portions of the record

designated or agreed upon by the parties and not certified by the Clerk.

Dated at Brighton, Colorado, this 27th day of October, 1982.

/s/ Philip F. Roan
PHILIP F. ROAN, Chief Judge

APPROVED:

PAUL Q. BEACOM, DISTRICT ATTORNEY
COUNTY OF ADAMS, STATE OF COLORADO
BY: /s/
DEPUTY DISTRICT ATTORNEY

BY: /s/
DEFENSE COUNSEL

(p. 66) REPORTER'S CERTIFICATE

The above and foregoing is a true and complete transcription of my stenotype notes taken in my capacity of Official Reporter of Division E, District Court, Adams County, Colorado, at the times and places above set forth.

Dated at Brighton, Colorado, this 27th day of October, 1982.

/s/ Leslie Maes
LESLIE MAES, Official Reporter,
Certified as a Qualified Court
Reporter in the State of Colorado

DISTRICT COURT, ADAMS COUNTY, COLORADO

Criminal Action No. 82CR0025, Division E

REPORTER'S TRANSCRIPT

THE PEOPLE OF THE STATE OF COLORADO,
Plaintiff,

vs.

ANTONIO GUADALUPE NUNEZ,
Defendant.

The hearing in this matter commenced on Friday, September 24, 1982, before the HONORABLE PHILIP F. ROAN, Chief Judge of the District Court in and for the County of Adams, State of Colorado.

FOR THE PLAINTIFF:

OFFICE OF PAUL Q. BEACOM
DISTRICT ATTORNEY, ADAMS COUNTY, COLORADO
450 South Fourth Avenue
Brighton, Colorado 80601

By: JEFFREY L. ROMEO, Registry No. 8454
Deputy District Attorney

FOR THE DEFENDANT:

KENNETH H. STERN, Registry No. 9198
1763 Franklin Street
Denver, Colorado 80219

(p. 2) (Whereupon, the following proceedings were had at the hour of 8:36 a.m., and the Defendant was not present.

The Court: People of the State of Colorado versus Antonio G. Nunez, 82CR0025.

Mr. Stern: Good morning, Your Honor. Kenneth H. Stern appearing on behalf of the Defendant.

The Court: Thank you, Mr. Stern.

Mr. Stern: As I indicated to the Court earlier this week, the Defendant is on trial in Denver, Colorado, Judge Plank's division, Courtroom 11. I understand the procedure we'll follow is a warrant will issue but it will be stayed so he can be here next week.

The Court: That's fine. Any problem, Mr. Romeo?

Mr. Romeo: No. I have no objection to the warrant being issued and stayed until a reasonable period of time when he can get in here.

The Court: Can you give me an idea when that will be?

Mr. Stern: We'd ask for one week, Your Honor.

The Court: We'll issue the bench warrant for the arrest of Mr. Nunez, stay the execution of that bench warrant until October 4, 1982, at 8:30 a.m.

Mr. Stern: Your Honor, in my discussions with Mr. Romeo—perhaps he can state his position. It's my understanding that they are not going to disclose the informant in which (p. 3) case I would have a number of motions to make if that in fact is the case.

Mr. Romeo: Your Honor, in this particular case it's my understanding, of course, it was the Court's ruling last time we were here we are required to disclose the informant. The Court felt under *Dailey* and some of the other cases that once the Defendant took the stand and contradicted the CI in any fashion where in this case—the only question was the CI's veracity—that the Court felt it had no discretion but to order the release of that informant. We, of course, felt otherwise. The Court

used the balancing test, and the Court felt in this situation once the Defendant takes the stand, the Court has no discretion.

In this case, Your Honor, we are not going to disclose the informant. As we had previously informed the Court, we have grave concern about the safety of the informant in this case. Mr. Nunez is pending a harassment of witness case plus an information in this case. Mr. Nunez stated to people he would get the confidential informant in this case. That being the information, the People would not be disclosing the confidential informant at this time.

Mr. Stern: Your Honor, at this time we would therefore move to dismiss or, in the alternative, that our Motion to Suppress be granted.

The Court: Well, we'll hear the motions if you file (p. 4) them in writing at an appropriate time.

Mr. Stern: We have filed our Motion to Suppress, Your Honor.

The Court: I understand. I'm not going to rule on it today.

Mr. Romeo: I take it my understanding of the Court's ruling is correct in what I stated previously.

The Court: To be honest with you, Mr. Romeo, I don't remember. I don't think that I said I didn't have any discretion once that had occurred. But, as I say, I don't recall. The record will reflect what my ruling was and what it was based on.

Mr. Romeo: All right.

Mr. Stern: Your Honor, I was wondering how we would be proceeding from this point. We did have a Motion to Suppress filed and pending. I believe you ordered that the informant be disclosed for the purpose of that Motion to Suppress. Now that the informant is not going to be disclosed—

The Court: We'll take it up on October 4.

Mr. Stern: That's fine.

Mr. Romeo: Your Honor, I'm wondering if in this case it might be well for the Court, considering the complexity of this issue and relative newness in the law, whether the Court might want to make written findings of fact.

The Court: I think I'll do that.

(p. 5) Mr. Stern: Your Honor, I don't know what position the Court takes. But I have prepared for the Court's information only a proposed findings of fact and conclusions of law the Court might want to review.

The Court: That's fine.

Mr. Stern: I am tendering a copy to the District Attorney. If I might approach the Bench.

The Court: Certainly. Thank you.

Mr. Stern: Thank you. Your Honor, just for one point of clarification, the Motion to Suppress will be continued until October 4?

The Court: Yes. Anything further on the Nunez matter?

Mr. Romeo: No, Your Honor.

Mr. Stern: Nothing at this time, Your Honor, on behalf of the Defendant.

Mr. Romeo: I've just received this, and I haven't had a chance to review it so—

The Court: Well, it doesn't make much difference. It's a proposal.

Mr. Romeo: All right. Thank you.

(Whereupon, the proceedings were concluded at the hour of 8:42 a.m.)

(p. 6) JUDGE'S CERTIFICATE

I, PHILIP F. ROAN, Chief Judge of the District Court in and for the County of Adams, State of Colorado, who presided at the hearing of this cause, hereby certify the foregoing to be all the portions of the record designated or agreed upon by the parties and not certified by the Clerk.

Dated at Brighton, Colorado, this 27th day of October, 1982.

/s/ Philip F. Roan
PHILIP F. ROAN, Chief Judge

APPROVED:

PAUL Q. BEACOM, DISTRICT ATTORNEY
COUNTY OF ADAMS, STATE OF COLORADO

BY: /s/
DEPUTY DISTRICT ATTORNEY

BY: /s/
DEFENSE COUNSEL

(p. 7) REPORTER'S CERTIFICATE

The above and foregoing is a true and complete transcription of my stenotype notes taken in my capac-

ity of Official Reporter of Division E, District Court, Adams County, Colorado, at the times and places above set forth.

Dated at Brighton, Colorado, this 27th day of October, 1982.

/s/ Leslie Maes
LESLIE MAES, Official Reporter,
Certified as a Qualified Court
Reporter in the State of Colorado

DISTRICT COURT, ADAMS COUNTY, COLORADO

Criminal Action No. 82CR0025, Division E

REPORTER'S TRANSCRIPT

THE PEOPLE OF THE STATE OF COLORADO,

Plaintiff,

vs.

ANTONIO GUADALUPE NUNEZ,

Defendant.

The hearing in this matter commenced on Monday, October 4, 1982, before the HONORABLE PHILIP F. ROAN, Chief Judge of the District Court in and for the County of Adams, State of Colorado.

FOR THE PLAINTIFF:

OFFICE OF PAUL Q. BEACOM
DISTRICT ATTORNEY, ADAMS COUNTY, COLORADO
450 South Fourth Avenue
Brighton, Colorado 80601

By: JEFFREY L. ROMEO, Registry No. 8454
Deputy District Attorney

FOR THE DEFENDANT:

KENNETH H. STERN, Registry No. 9198
1763 Franklin Street
Denver, Colorado 80219

(p. 2) (Whereupon, the following proceedings were had at the hour of 9:44 a.m.)

Mr. Stern: Good morning, Your Honor. Kenneth H. Stern appearing on behalf of Mr. Nunez who is present in court this morning.

The Court: Thank you, Mr. Stern.

Mr. Stern: Good morning, Your Honor.

The Court: Good morning, Mr. Romeo.

Mr. Romeo: This, Your Honor, came on merely for the return of the Defendant on his bench warrant that was issued and stayed until this morning from 9-24, our previous hearing date.

Mr. Stern: Also, Your Honor, I believe that the Court was going to rule at this time on the Defendant's Motion to Dismiss or, in the alternative, a Motion to Suppress which was made orally on the 24th and was set over to this date, and the Court requested us to file a motion which I have filed, a copy of which was sent to the District Attorney's Office.

Mr. Romeo: Your Honor, I haven't received that motion. Mr. Stern has just handed me a copy this date. It was mailed on the 27th.

Mr. Stern: Your Honor, if you will recall, at the last court hearing the District Attorney announced they were not going to disclose the informant pursuant to the

Court's order. I at that time moved to have the case dismissed or, in (p. 3) the alternative, to have the Motion to Suppress granted. You requested I file a written motion to that effect.

The Court: All right.

Mr. Romeo: Your Honor, also the last time we were here I had suggested to the Court and the Court had indicated that it would probably do so, to make some findings of fact and law in this regard because I had attempted to outline my understanding of what the Court's ruling was basically at our previous hearing on the Motion to Disclose the Confidential Informant and the Court wasn't sure my interpretation was correct. And I think really we had a somewhat confused hearing at that time, and that's why I requested and I think that's why the Court suggested it would make findings of fact.

Mr. Stern: I did at that time, Your Honor, submit proposed findings for the Court's review.

The Court: The Court has reviewed the findings that were prepared by Mr. Stern. The Court wants to make its own findings of fact and enter its own order. The Court will do that by Friday of this week.

Mr. Stern: Your Honor, just for my information, there was another aspect to my Motion to Suppress other than this aspect. This might I would presume resolve that. However, there was another contention in the Motion to Suppress, and also we have a trial date I think set for October 27. Would your ruling that would come out on Friday state the Court's position about (p. 4) whether—in other words, what I'm wondering is whether

the jury is going to be vacated for that date or whether we—

The Court: Well, I think that will be taken care of in the order.

Mr. Stern: Thank you.

The Court: Mr. Romeo?

Mr. Romeo: That's fine, Your Honor. Obviously, the other parts of any Motion to Suppress can't be addressed by the Court because they haven't been heard I assume.

Mr. Stern: I wasn't asking the Court to enter ruling. I was depending on what occurs with this motion. I was just making it known to the Court and the District Attorney that there was another aspect that would be heard should the Court rule in a certain way or would not be necessary should the Court rule in another way.

The Court: All right. The Court will find Mr. Nunez is present before the Court at this time. We'll vacate that bench warrant. The trial date will be the bond return date for Mr. Nunez at this time. The Court will issue an order Friday of this week.

Mr. Stern: Thank you, Your Honor.

Mr. Romeo: Thank you.

The Court: Yes. Thank you.

(Whereupon, the proceedings were concluded at the hour of 9:49 a.m.)

(p. 5) JUDGE'S CERTIFICATE

I, PHILIP F. ROAN, Chief Judge of the District Court in and for the County of Adams, State of Colorado, who presided at the hearing of this cause, hereby certify the foregoing to be all the portions of the record designated or agreed upon by the parties and not certified by the Clerk.

Dated at Brighton, Colorado, this 27th day of October, 1982.

/s/ Philip F. Roan
PHILIP F. ROAN, Chief Judge

APPROVED:

PAUL Q. BEACOM, DISTRICT ATTORNEY
COUNTY OF ADAMS, STATE OF COLORADO

BY: /s/
DEPUTY DISTRICT ATTORNEY

BY: /s/
DEFENSE COUNSEL

(p. 6) REPORTER'S CERTIFICATE

The above and foregoing is a true and complete transcription of my stenotype notes taken in my capacity of Official Reporter of Division E, District Court, Adams County, Colorado, at the times and places above set forth.

Dated at Brighton, Colorado, this 27th day of October, 1982.

/s/ Leslie Maes
LESLIE MAES, Official Reporter,
Certified as a Qualified Court
Reporter in the State of Colorado

IN THE DISTRICT COURT, ADAMS COUNTY,
STATE OF COLORADO

Criminal Action No. 82CR0025

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

THE PEOPLE OF THE STATE OF COLORADO,

Plaintiff,

vs.

ANTONIO NUNEZ,

Defendant.

The Defendant's MOTION FOR DISCLOSURE OF INFORMANT having come before the Court on September 9, 1982, and the Court having heard testimony and the arguments of counsel and being fully advised in the premises, does make the following Findings of Fact, Conclusions of Law and Order:

1. On November 7, 1981, a member or members of the Denver Police Department prepared an affidavit for search warrant and based upon said affivadit, obtained a search warrant for 8690 Norwich Street, Adams County, Colorado, and two named vehicles.

2. During the execution of said search warrant, approximately fifteen balloons of heroin were recovered.

3. The affidavit, upon which issuance of the search warrant was predicated, related information from a previously reliable confidential informant that the informant was at the location of 8690 Norwich within the twenty-four hour period from November 6, 1981, to November 7, 1981 and observed Antonio "Pic" Nunez in possession of a large amount of heroin, that Nunez was cutting the

heroin, that Nunez was putting the heroin in balloon packages, that Nunez told the informant that he had just returned from Mexico where he had purchased five ounces of heroin which he brought into the United States.

4. The Defendant filed a motion seeking disclosure of the identity of the informant described in Paragraph 3. above.

5. The Motion For Disclosure is two pronged alleging a need for the purpose of challenging the legality of the search and a need for defending against the substantive charge.

6. At the hearing, the Defendant testified that he had been on a hunting trip for the week proceeding the date of the affidavit and search, having arrived home on November 6, 1981. He also testified he had driven the motor home described in the affidavit on the hunting trip. The Defendant further testified that from the time he returned home to the time the search warrant was executed, only immediate family members had been present in his home and that he had not engaged in the activities described by the confidential informant.

7. The Court finds that as to the legality of the search issue, the Defendant has made the required initial showing pursuant to *People v. Bueno,* Vol. VI, Brief Times Report, p. 522 (June, 1982).

8. The Court finds that as to the issue of disclosure on the basis of the informant's being an essential witness on the issue of guilt or innocence, the Defendant has made a showing of a reasonable basis in fact to believe the informant is a likely source of relevant and helpful evidence to the accused.

9. The Court, therefore, orders the District Attorney to disclose the identity of the confidential informant to the Defendant and failing that, the Court orders suppression of the evidence seized pursuant to the search warrant.

Done and signed in Open Court this 7th day of October, 1982.

BY THE COURT:
/s/ Philip F. Roan
Philip F. Roan
Chief Judge

copies to counsel
10/7/82

IN THE
DISTRICT COURT, ADAMS COUNTY, COLORADO
Criminal Action No. 82CR0025, Division E

ORDER

THE PEOPLE OF THE STATE OF COLORADO,

Plaintiff,

vs.

ANTONIO NUNEZ,

Defendant.

THE COURT being advised by the District Attorney that the identity of the confidential informant will not be disclosed to the Defendant, the evidence which is the subject of the Defendant's Motion to Suppress is, therefore, suppressed.

Done and signed in Open Court this 12th day of October, 1982.

BY THE COURT:
/s/ Philip F. Roan
Philip F. Roan
Chief Judge

copies to counsel
10/12/82

DISTRICT COURT, ADAMS COUNTY, COLORADO

Criminal Action No. 82CR0025, Div. E

NOTICE OF INTERLOCUTORY APPEAL

(Filed October 18, 1982)

THE PEOPLE OF THE STATE OF COLORADO,

Plaintiff-Appellant,

vs.

ANTONIO GUADALUPE NUNEZ,

Defendant-Appellee.

The plaintiff, by counsel, pursuant to C.A.R. 4.1 appeals the decision of the District Court to suppress evidence in this case. As grounds for this motion, the plaintiff alleges:

1. The defendant was charged with Possession of a Schedule I Controlled Substance, contrary to C.R.S. 1973, § 12-22-309 and § 18-18-105 (2) (a), as amended.

2. On November 7, 1981, officers of the Denver Police Department and the Adams County Sheriff's Office searched the defendant's residence pursuant to a warrant. During this search, those officers searched the defendant and discovered heroin.

3. Pursuant to C.R.Cr.P. 41, the defendant requested that the prosecution disclose the confidential informant's identity. The defendant also moved to suppress the evidence seized during the search, alleging that the warrant upon which the police officers relied to gain entry into the defendant's house was not based upon probable cause.

4. The trial court heard the prosecution's testimony concerning these motions on September 24, 1982, and October 4, 1982.

5. On October 7, 1982, the trial court issued Findings of Fact and Conclusions of Law. That court held that the prosecution must disclose the identity of the informant. If the prosecution did not make that disclosure, the trial court stated that it would suppress the evidence seized pursuant to the search warrant.

6. After being advised by the prosecution that it would not disclose the informant's identity, the trial court suppressed the evidence seized pursuant to the search warrant on October 12, 1982.

7. That ruling was error.

8. The evidence that the court suppressed is a substantial part of the prosecutions' proof against the defendant.

9. This appeal is not taken for purposes of delay.

WHEREFORE, the plaintiff respectfully appeals from the decision of the District Court to suppress the evidence in this case.

Respectfully submitted,

PAUL Q. BEACOM, District Attorney
Seventeenth Judicial District

By: /s/ Steven L. Bernard
Steven L. Bernard, No. 8897
Chief Trial Deputy
450 South Fourth Avenue
Brighton, CO 80601 (303) 659-7720

CERTIFICATE OF SERVICE

I certify that on the ____ day of _____, 1982, a true copy of the Notice of Interlocutory Appeal was deposited in the U.S. Mail at Adams County, Colorado, postage prepaid, in a securely sealed envelope, addressed to:

Kenneth H. Stern, Esq.
1760 Lafayette Street
Denver, CO 80218

SUPREME COURT, STATE OF COLORADO

Criminal Action No. 82SA512, Division E

OPENING BRIEF

(Filed November 29, 1982)

THE PEOPLE OF THE STATE OF COLORADO,
Plaintiff-Appellant,

vs.

ANTONIO GUADALUPE NUNEZ,
Defendant-Appellee.

Interlocutory Appeal to the District Court,
Adams County, Colorado

Case No. 82CR0025

The Honorable Philip F. Roan, Judge

PAUL Q. BEACOM
District Attorney

STEVEN L. BERNARD
Chief Trial Deputy
Seventeenth Judicial District
450 South Fourth Avenue
Brighton, Colorado 80601
659-7720

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(p. 1) SUPREME COURT, STATE OF COLORADO

Case No. 82SA512

OPENING BRIEF

THE PEOPLE OF THE STATE OF COLORADO,
Plaintiff-Appellant,

vs.

ANTONIO GUADALUPE NUNEZ,
Defendant-Appellee.

STATEMENT OF FACTS

On November 7, 1981, pursuant to a warrant, Denver police officers and Adams County Sheriff's deputies searched the house located at 8690 Norwich Street, unincorporated Adams County, Colorado. During this search, these officers searched the person of the defendant, Antonio Nunez. The officers discovered fifteen balloons in Mr. Nunez's pockets, which contained a substance later analyzed to be heroin. Based upon this evidence, the prosecution charged Mr. Nunez with possession of a Schedule I Controlled Substance, contrary to C.R.S. 1973, § 12-22-309, as amended, and C.R.S. 1973,

§ 18-18-105 (2) (a), as amended. (Record, Vol. I, 1-3; Record, Vol. II, hearing of 9/9/82, hereinafter "Vol. II, A," 52-55).

STATEMENT OF THE CASE

Through counsel, Mr. Nunez filed a motion to suppress the heroin seized from him and a motion requesting that the court order the prosecution to disclose the name of a confidential informant upon whose statements the search warrant executed on November 7, 1981, was partially based. (Vol. I, 5-7). On September 9, 1982, the District Court held a hearing on those motions. The affidavit for the warrant was introduced at the hearing. (Vol. II, A, 10). It (p. 2) contained information provided by three separate confidential informants. Defense counsel stated that he only sought the disclosure of one informant, alleging that only that person's credibility was in issue. (Vol. II, A, 9-10).

The affiant, Denver Police Sergeant Don DeNovellis, had written that the informant in question had told Sgt. DeNovellis that the informant had seen Mr. Nunez with a "large amount of heroin" within twenty-four hours of November 7, 1981. The informant said that Mr. Nunez had stated that he had just returned from Mexico, where he had purchased five ounces of heroin. The informant watched Mr. Nunez dilute the heroin and then package it in balloons. Sgt. DeNovellis wrote that the informant recognized heroin because he/she had previously used it. Sgt. DeNovellis also noted that the informant had previously provided him with reliable information that had led to seizure of heroin.

Defense counsel conceded that the credibility of the affiant, Sgt. DeNovellis, was not at issue. Instead, he

questioned the informant's veracity. He argued that the informant's identity should be revealed so that he could subpoena the informant to testify at the suppression hearing. (Vol. II, A, 13).

Mr. Nunez testified in order to support his attorney's allegations. Mr. Nunez stated that on October 31, 1981, he had driven his motorhome from his house on Norwich Street to the mountains in order to hunt. He said that he was accompanied by his father, his son, his nephew and a friend. Mr. Nunez stated that he had returned from his trip in the early morning hours of November 6, 1981. While he spent all of that day at the Norwich Street address, he insisted that no one visited his home except for his immediate family and at least eight other relatives. He denied that he had travelled to Mexico between October 31 (p. 3) and November 6. (Vol. II, A, 26-29). On cross-examination, Mr. Nunez admitted that he was awaiting trial in Denver on a charge of intimidating a witness. (Vol. II, A, 33-34). The defense did not present the testimony of any of the people who allegedly went hunting with Mr. Nunez or of anyone who had been at his home on November 6, 1981.

The prosecution argued that the court should not order the police to disclose the informant's identity. First, the prosecutor mentioned that disclosure of the informant's identity could endanger that person's safety. (Vol. II, A, 23). Second, he pointed out that defense counsel was not questioning the affiant's credibility, but rather the credibility of the informant. Third, he observed that the prosecution would not use the informant as a wit-

ness at trial because the informant was not a witness to the incident upon which the charge was based. Fourth, he submitted that there was no disagreement between the informant's statements and Mr. Nunez's testimony. He concluded by stating that defense counsel had not established that discloseure of the informant's identity would be essential to the motion to suppress. (Vol. II, A, 56-59).

After hearing arguments of both counsel, the trial court found that disclosure of the informant's identity was necessary to resolve the motion to suppress and ordered the prosecution to reveal the informer's name. (Vol. II, A, 62-63). The prosecutor subsequently informed the court that he would not disclose the informant's identity because he was concerned for his/her safety. (Vol. II, hearing of 9/24/82, 3). On October 7, 1982, the trial court, in a written opinion, found that disclosure of the informant was essential to the resolution of the case. Because the prosecution refused to disclose the informant's identity, the trial court suppressed the evidence taken from the (p. 4) defendant in the search that occurred on November 7, 1981. (Vol. I, 8-10). The prosecution then filed this interlocutory appeal.

ISSUE PRESENTED

Since defense counsel stated that he was not questioning the affiant's credibility, did the trial court apply an improper legal standard when it ordered the prosecution to disclose the informant's identity and, when the prosecution refused to do so, when it suppressed the evidence in this case.

SUMMARY OF THE ARGUMENT

The government has a qualified privilege to withhold the identity of a confidential informant. A court may override that privilege and order the prosecution to disclose the informant's identity if that information will be relevant to a case or necessary for the just resolution of a case. An accused's request for disclosure usually arises in two situations. First, if an informant was a witness the event upon which a criminal charge is later based, a court may order disclosure of that person's identity because he may be the source of a potentially exculpatory evidence.

Second, a defendant may seek the identity of a confidential informant who provided the police with information that subsequently appeared in a search warrant. In this situation, if the accused establishes, by a preponderance of the evidence, that the *affiant* lied or recklessly disregarded the truth in relating what the informant said, then the court may strike the sections of the affidavit based upon the questionable statements and evaluate the remainder to see if it establishes probable cause. In order to make this determination, a court, after a proper allegation by the accused that brings the *affiant's* (p. 5) credibility into issue, may order disclosure of the informant's identity so that he can be subpoenaed to testify.

There must be an attack upon the *affiant's* credibility before the informant can be disclosed. This requirement is based upon the purposes behind suppression hearings. Unlike the situation where an informant has witnessed a crime and may, therefore, know of relevant evidence, when an accused seeks to suppress evi-

dence he seeks to suppress the truth. The purpose of a suppression motion is to remove probative evidence from a jury's deliberation as a sanction for police misconduct. If the police act properly, then suppression of the evidence is inappropriate. If an *informant* lies or recklessly disregards the truth, but the police then act carefully and responsibly, suppression is an improper remedy because it will not discourage police misfeasance. In this scenario, the wrong doing, if any, comes from a private source: the informant. The Fourth Amendment's protections do not apply to such private sources.

In the case at bar, defense counsel readily conceded that the affiant's credibility was not an issue. That concession mooted his motions, because it established that there was no basis for ordering the prosecution to disclose the informant's identity or for suppressing the prosecution's evidence. Since there was no police misconduct in developing the search warrant, therefore, there was no reason for the trial court to impose any sanctions.

ARGUMENT

THE TRIAL COURT APPLIED THE WRONG STANDARD WHEN IT ORDERED THE PROSECUTION TO DISCLOSE THE INFORMANT'S IDENTITY AND THEN SUPPRESSED THE EVIDENCE SEIZED PURSUANT TO A SEARCH WARRANT.

It is a fundamental principle that the government is privileged to withhold the identity of informers who aid the police. *Rovario v. United* (p. 6) *States,* 353 U.S. 53 (1957); *McCray v. Illinois,* 386 U.S. 300 (1967). The reason for this qualified privilege is obvious. A person may

fear retribution from an accused and refuse to give the police important information about a crime unless that person's anonymity is assured. Some crimes would never be solved without the promise of confidentiality to some informants because the privilege encourages some citizens to provide the police with information that they would otherwise withhold.

If a defendant can demonstrate that the disclosure of an informant's name is "relevant and helpful to the defense of an accused, or . . . essential to the determination of a cause," then a trial court may invade the privilege and order the government to reveal an informant's identity. *Roviaro* at 60-61. There are few hard and fast rules that govern when an informant's identity should be revealed. Each case is decided *ad hoc* by balancing the public interest in the informant's anonymity against an accused's due process right to a fair trial. *Roviaro, supra; DeLaCruz v. People,* 177 Colo. 46, 492 P. 2d 627 (1972).

If a confidential informant is a witness to the event that forms the basis for a criminal charge, then the defendant's need for that person as a witness who may provide potentially exculpatory evidence is a strong factor for a trial court to consider when balancing the needs of the government and of the defense. *People v. Musgrave* 187 Colo. 135, 529 P. 2d 313 (1974). However, even in that situation a court is not required to order disclosure. *People v. Marquez,* 190 Colo. 255, 546 P. 2d 482, 485 (1976). In fact, if the evidence shows that a person was "an informant and nothing more," then the prosecution should not normally be required to disclose the informant's identity. *People v. Langford,* 191 Colo. 87, 550 P. 2d 329, 331 (1976).

Usually, an accused's request for disclosure of an informant's identity (p. 7) arises in two situations. *People v. Bueno,* 646 P. 2d 931 (Colo. 1982). First, as stated above, an informant may have witnessed a crime with which a defendant is charged and the disclosure of his name may be necessary to provide the defendant with a fair trial. Second, an accused may attack a search warrant based, in whole or in part, upon a confidential informant's statements. If the accused successfully makes certain preliminary showings, as will be discussed below, then the court may order disclosure of an informant's name so that he may be supboenaed [sic] to testify at the suppression hearing. *People v. Dailey,* 639 P. 2d 1068 (Colo. 1982).

The case at bar is focused upon the preliminary showing that a defendant must make before a court may order the government to reveal an informer's name. In *Dailey,* this Court held that if an accused can show, in good faith, that there is a statement in the affidavit that may be false, and that this misstatement may have been a product of the affiant's lies or his reckless disregard for the truth, then the court may order disclosure of the informant's identity. Then, if the [defendant] shows, by a preponderence of the evidence, that the affiant, in fact, committed perjury or recklessly ignored the truth, then the court may strike those statements from the affidavit and assess it on the remaining facts.

The defendant's preliminary burden was more fully defined in *People v. Bueno, supra.* In that case, Justice Quinn wrote at 936:

> **[A] defendant will meet this initial burden when he establishes a reasonable basis in fact to believe**

> that *the informer did not exist,* or, if he does, *he did not relate to the police* the information upon which the police purportedly relied as probable cause for the arrest warrant. (Emphasis supplied).

This statement makes it clear that an accused must question the conduct of the police in constructing the warrant before he may request the court to order the (p. 8) prosecution to reveal the informant's identity. This position is supported by at least two other Colorado decisions that are cited in *Dailey.*

In *People v. Woods,* 175 Colo. 34, 485 P. 2d 491 (1971), this Court distinguished between situations where the affiant's veracity was attacked and those where only the informant's credibility was questioned. Justice Erickson wrote at 492:

> [I]f the material in the affidavit is stated to be or appears to be hearsay information obtained from an informant or other person, and the information turns out to be incorrect, *we will not use hindsight as a test to determine whether the search warrant should or should not have been issued.* (Emphasis supplied).

In *People v. Arnold,* 186 Colo. 372, 527 P. 2d 806 (1974), the accused argued that the trial court, after hearing testimony that diametrically contradicted the information in the warrant provided by the informant, should have ordered disclosure of the informer's identity because he was "fictitious." This Court disagreed and affirmed the accused's conviction. Obviously, the accused had attacked the police-affiant's credibility by alleging that the informant did not exist.

The need for a demonstration of some police misconduct before an informant's identity should be ordered

disclosed is based on several grounds. First, without such a requirement, an accused would demand disclosure of an informer's name in every case. This problem was recognized in *McCray v. Illinois, supra.* The United States Supreme Court held that a court need not order disclosure unless an accused has established an evidentiary basis to believe that the police-affiant perjured himself or recklessly disregarded the truth. In quoting New Jersey's Chief Justice Weintraub at 306-307, the Supreme Court recognized that a defendant's "good faith" in challenging an informant's credibility could never be accurately tested. Thus, disclosure would become (p. 9) automatic. The Supreme Court rejected such a result.

Second, the purpose of a motion to suppress is to determine whether the state's representatives have gathered evidence in a way that offends the Constitution. The "exclusionary rule" is designed to control unjustified intrusions into the privacy of citizens by government agents. *Mapp v. Ohio,* 367 U.S. 643 (1961). However, that sanction is not aimed at the actions of private citizens, even if those acts are illegal. For example, if a private person conducts a search that would be unconstitutional if perpetrated by a police officer, a court will not "suppress" that evidence because it was not a product of government action. *Burdeau v. McDowell,* 256 U.S. 465, 475-476 (1921); *Coolidge v. New Hampshire,* 402 U.S. 443, 487 (1971); *People v. Benson,* 176 Colo. 421, 490 P. 2d 1287 (1971); *People v. Henderson,* 38 Colo. App. 308, 559 P. 2d 1108 (1976).

The United States Supreme Court applied this reasoning in *McCray v. Illinois, supra,* at 307-308:

> [T]he magistrate is concerned, *not with whether the informant lied*, but whether the *affiant* is truthful in his recitation of what he was told. If the magistrate *doubts the credibility of the affiant*, he may require that the informant be identified or even produced. (Emphasis supplied).

As the passage quoted above indicates, this Court seems to have adopted this position in *People v. Woods, supra.*

McCray and *Woods* both show that a court will not delete portions of a search warrant if the police acted properly in obtaining information from an informant, but it is then later determined that the informant was either lying or incorrect. Not only would such a sanction not serve any deterrent purpose, but this situation should not even trigger the Fourth Amendment's proscriptions because there has not been state action adverse to the accused. If a warrant (p. 10) should not be excised because the affiant's credibility is not in dispute, then, *a fortiori,* there is no reason to order disclosure of an informant's identity.

In the case at bar, the trial court applied the wrong standard when it ordered the prosecution to disclose the informant and, subsequently, when it suppressed the evidence taken from Mr. Nunez. When the trial court found that defense counsel had made the necessary showing to require the prosecution to reveal the informer's name (Vol. I, 9), it did so without requiring the defense to provide some reasonable facts that would show that the affiant lied or recklessly disregarded the truth. In fact, defense counsel clearly stated that he was not questioning the affiant's credibility. (Vol. II, A, 13). At that point, as the above cases indicate, the defense had failed to

establish the necessary factual predicate that would support the court's disclosure order. Without that predicate, the trial court had no basis to require the prosecution to reveal the informer's name, and, then, to suppress the evidense taken from Mr. Nunez. As this Court held in *People v. Bueno, supra,* at 936:

> In every case . . . an order of disclosure must be supported by the record and may not rest upon speculation or conjecture.

In the instant case, the record contains no indication that the disclosure order was supported by the record because defense counsel's statement removed any factual or legal basis for a disclosure order. The trial court's order suppressing the evidence and ordering the prosecution to reveal the informant's identity should therefore be reversed.

CONCLUSION

When defense counsel stated that the affiant's credibility was not questioned, United States Supreme Court and Colorado Supreme Court authority (p. 11) indicate that the defense abandoned any basis to request that the trial court order the prosecution to disclose the informant's identity. Without this necessary allegation of governmental misconduct, the issue of the informant's veracity is outside of the Fourth Amendment and the suppression of evidence or a disclosure order would not serve any prophylactic purpose. The trial court therefore erred when it found that the defense had made a necessary showing to require the prosecution to reveal the informer's name. Instead, the trial court should

have summarily denied both motions. The trial court's ruling should therefore be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on the 29th day of November, 1982, a true copy of the Opening Brief was deposited in the U.S. Mail at Adams County, Colorado, postage prepaid, in a securely sealed envelope, addressed to: Kenneth H. Stern, Esq., 1760 Lafayette Street, Denver, CO 80218.

/s/ Karyl Tudehope

SUPREME COURT, STATE OF COLORADO

Case No. 82SA512

ANSWER BRIEF

(Filed December 16, 1982)

THE PEOPLE OF THE STATE OF COLORADO,

Plaintiff-Appellant.

vs.

ANTONIO GUADALUPE NUNEZ,

Defendant-Appellee.

Interlocutory Appeal to the District Court,
Adams County, Colorado

Case No. 82CR0025

The Honorable Philip F. Roan, Judge

Respectfully submitted,

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(p. 1) SUPREME COURT, STATE OF COLORADO

Case No. 82SA512

ANSWER BRIEF

THE PEOPLE OF THE STATE OF COLORADO,
Plaintiff-Appellant,

vs.

ANTONIO GUADALUPE NUNEZ,
Defendant-Appellee.

I. STATEMENT OF FACTS

On November 7, 1981, members of the Denver Police Department obtained a search warrant to search premises and motor vehicles located at 8690 Norwich Street, Adams County, Colorado. The search warrant was based upon information from three (3) confidential informants. The search warrant was executed on November 7, 1981, and during the execution of same, fifteen (15) balloons were allegedly found in the pocket of the defendant Mr. Nunez. Inside the balloons, a substance was allegedly discovered which was later analyzed and found to be heroin. Based upon the evidence recovered from the

search of Mr. Nunez' pockets, the defendant was (p. 2) charged in a one count information with possession of a controlled substance, Schedule I in violation of C.R.S. 1973, § 12-22-3309, and § 18-18-105 (2) (a), as amended.

II. STATEMENT OF THE CASE

The defendant was arraigned in front of Judge Roan, Chief Judge of Adams District Court on February 2, 1982 (Vol. I, p. 15).

On February 25, 1982, the defendant filed the following motions: Motion to Suppress, Motion to Disclose Informant, Motion for Disclosure of Deals and/or Compensation (Vol I, pp. 4-7). On September 9, 1982, a hearing was held on the defendant's motions.

It must be noted that the only motion every adjudicated *on the merits,* was the Motion to Disclose Informant (Vol. II, 9-9-82 hearing, hereinafter referred to as "Vol. II, A," pp. 59-61). At the beginning of the September 9, 1982, hearing, counsel for the defendant had requested adjudication of the disclosure motion first so, in the event that it was granted, he could subpoena the confidential informant for the hearing on the Motion to Suppress (Vol. II, A, p. 13).

(p. 3) The court never reached the defendant's Motion to Suppress on the merits. Rather, it was granted on October 12, 1982, after the District Attorney had informed the court that he would not disclose the identity of the confidential informant despite being ordered to do by Judge Roan (Vol. I, 10).

On October 7, 1982, Judge Roan entered written Findings of Fact, Conclusions of Law, and Order re-

garding the defendant's Motion for Disclosure of Informant in which he granted same. On October 18, 1982, the appellant filed their Notice of Interlocatory Appeal pursuant to C.A.R. 4.1.

III. ISSUE PRESENTED

A. Is the ruling of a district court granting a Motion to Disclose Informant the proper subject of an interlocatory appeal pursuant to C.A.R. 4.1? If the court rules it has jurisdiction, did the trial court commit error in granting the Motion to Disclose Informant.

IV. SUMMARY OF ARGUMENT

A. As indicated above, the only motion ever adjudicated by the court was the defendant's Motion for Disclosure of Informant. After hearing testimony and the (p. 4) arguments of counsel, the court granted the defendant's motion based on his finding that the confidential informant would be a necessary witness at the suppression hearing (Vol. II, A, 63). Subsequent to this ruling, the district attorney indicated that he would not disclose the informant's identity and on the basis of this assertion, the court granted the defendant's Motion to Suppress.

In their opening brief, the appellant argues the merits of the court's ruling on the Motion to Disclose Informant. There is virtually no discussion regarding the granting of the Motion to Suppress since it is clear from the facts that it was imposed merely as a remedy for non-disclosure.

Therefore, before adjudicating the appellant's challenge to the trial court's ruling on disclosure, this Court

must first determine that it has jurisdiction to hear the instant appeal.

C.A.R. 4.1 sets specific limitations regarding which issues may be raised in an interlocutory appeal. The appellee would argue that a ruling on a Motion to Disclose Informant is not the proper subject for such an appeal.

Should the court determine that it has jurisdiction to hear the instant appeal it is clear that the trial court's ruling on the defendant's Motion to Disclose Informant was (p. 5) correct, both in law and fact.

In arguing that the trial court committed error in granting the Motion to Disclose Informant, the appellant misconstrues and misapplies the relevant sections of *People v. Dailey,* 639 P. 2d 1068 (1982). The *Dailey* case involved two issues: to wit, the granting of the defendant's Motion to Disclose Informant and the subsequent granting, *on the merits* of the defendant's Motion to Suppress Evidence.

The appellee cites, in support of its contention that the court erroneously granted disclosure, portions of the *Dailey case* dealing specifically with the issue of suppression. This court's discussion of the issue of disclosure, which is found in III of the *Dailey* decision, which was later affirmed and expanded in the case of *People v. Bueno,* 646 P. 2d 931 (1982), clearly supports the decision of the trial court in the instant case.

V. ARGUMENT

A. The ruling of a District Court granting a Motion to Disclose Informant is not the proper subject of

an interlocutory appeal pursuant to C.A.R. 4.1. Assuming *arguendo* that this Court has jurisdiction, the Trial Court did not commit error in granting the motion.

(p. 6) Rule 4.1 of the Colorado Appellate Rules specifically and strictly limits the type of rulings from which an interlocutory appeal may be taken. C.A.R. 4.1 reads in pertinent part:

> The State may file an interlocutory appeal in the Supreme Court from a ruling of a district court granting a motion made in advance of trial by the defendant for return of property and to suppress evidence or granting a motion to suppress an extra-judicial confession or admission; . . .

A plain reading of the rule would indicate that the State may not take an interlocutory appeal from a Motion to Disclose Informant. Furthermore, this court has held that the Supreme Court will not expand the jurisdiction set forth in the rule. *People v. Singleton*, 482 P. 2d 978 (1971).

A careful reading of the appellant's Notice of Interlocatory Appeal (Vol. I, 11) indicates that the only ground upon which the appeal is taken is the trial court's decision to suppress evidence based upon the prosecution's failure to disclose the identity of the informant (see paragraphs 4, 5, 6 and 7 of the appellant's Notice of Interlocutory Appeal, Volume I, 11). In other words, the appeal is taken only from the imposition of suppression as a remedy for non-disclosure. Therefore, suppression is really (p. 7) a collateral matter with disclosure being the real issue in controversy. C.A.R. 4.1 does not provide for an interlocutory appeal from a motion to disclose informant and therefore the instant appeal is outside the ambit of the rule.

The appellees are not unaware of footnote 8 of the *Dailey* decision. The fact that the trial court never determined the plaintiff's Motion to Suppress, on the merits, would make the instant situation distinguishable from the one discussed in the *Dailey* case. In that case this Court adjudicated both motions and therefore held that the issues were intertwined. The situation is quite different when suppression is imposed merely as a remedy for non-disclosure.

Should this court decide that it has jurisdiction to entertain the instant appeal, the appellee would argue that the decision of the trial court judge was correct both in law and fact.

It is axiomatic that courts throughout the nation have recognized a privilege on behalf of the prosecution to withhold from disclosure the identities of individuals who provide information to the police regarding possible law enforcement violations. *People v. Del Alamo,* 624 P. 2d 1301 (p. 8) (1981); *McKray v. Illinois,* 386 U.S. 300, 87 S.Ct. 1056, 18 L. Ed. 2d 62 (1967); *Roviaro v. United States,* 353 U.S. 53, 77 S. Ct. 623, 1 L. Ed. 2d 639 (1957).

This court and other courts, however, have recognized that "the privilege is not absolute, however, and must be confined in its application based upon its underlying purpose". *People v. Dailey, supra,* at p. 1076.

In the *Dailey* case, this court cited with approval the following tests prescribed by *Roviaro v. United States, supra:*

> We believe that no fixed rule with respect to disclosure is justifiable. The problem is one that calls

> for balancing the public interest and protecting the flow of information against the individual's right to prepare his defense. Whether a proper balance renders non-disclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informers testimony and other relevant factors. 353 U.S. at 62; 77 S.Ct. at 628-29; L. Ed. 2d at 646.

639 P. 2d at 1077.

(p. 9) In further elucidating this standard, this Court, in *Dailey* also cites the following passage from *Roviaro* with approval:

> Where the disclosure of an informant's identity or the contents of his communication is relevant and helpful to the defense of an accussed, or is essential to a fair determination of a cause, the privilege must give way. 353 U.S. at 60-61, 77 S. Ct. at 628, 1 L. Ed. at 645.

639 P. 2d at 1077.

Finally, this Court states that the decision regarding disclosure must be committed to the sound discretion of the trial court. *People v. Dailey, supra,* at 1077. Also this is consistent with numerous other decisions regarding the binding nature of a trial court's findings regarding the facts surrounding a particular case. See *People v. Ellis,* Colo. App. 539 P. 2d 135 (1975); *People v. Martinez,* 527 P. 2d 534 (1974); and, *People v. Trujillo,* 500 P. 2d 1126 (1972).

It should be noted, that the preceding authority is found in § III of the Court's Opinion in the *Dailey* case which contains the authority to be applied in determining the appropriateness of disclosure of an informant.

(p. 10) On page 7 of their opening brief, the appellants assert that, in order to obtain disclosure of the informant, the defendant, at the trial court level, must:

> Show, in good faith, that there is a statement in the affidavit that may be false and that the misstatement may have been a product of the affiant's lies or his reckless disregard for the truth, . . .

Appellant's Opening Brief, p. 7

While this standard is discussed in the context of the *Dailey* decision, it is found in Section II B of the Opinion which deals specifically with the standard to be employed in the actual adjudication of veracity challenges to search warrants. As the appellee has indicated above (perhaps ad nauseam), the trial court never reached, or ruled on, the defendant's veracity challenge to the search warrant in the instant case. Rather, the court ordered disclosure and when the prosecution failed to so disclose, ordered the evidence suppressed. Therefore, the appellants reliance on the above-cited standard set forth in the *Dailey* case is misplaced since it does not go to the issue of disclosure.

In *People v. Bueno, supra,* this Court further expanded upon the test or standard which governs disclosure of confidential informants. In the *Bueno* case, the discussion (p. 11) focused on the two common situations in which the disclosure of an informant is requested, to wit: for use in connection with a Motion to Suppress Evidence and for use at trial.

With respect to disclosure in connection with a Motion to Suppress, the court stated that "a defendant seeking disclosure must make an initial showing that

the informant will provide information essential to the merits of his suppression ruling. Id. at p. 935. The court goes on to state in *Bueno:*

> Thus, a defendant will meet this initial burden when he establishes a reasonable basis in fact to believe that an informer does not exist or, if he does, he did not relate to the police the information upon which the police purportedly relied as proper cause for an arrest or search. Disclosure in such cases not only safeguards the defendants right to be free from an unlawful arrest or search, but also protects the judicial process itself against abuse by false affidavit of testimony.

Id. at 936.

In the context of articulating this test or standard, this Court gives an example in which disclosure would be proper by alluding to the facts of the *Dailey* case which involved the defendant making an initial showing that good faith basis in fact existed to question the affidavit's accuracy. Id. at p. 936.

(p. 12) Once the informant is disclosed and the defendant has an opportunity to interview him and procure his attendance at the suppression hearing, then, in order to prevail on his Motion to Suppress, the defendant must prove that the misstatement or incorrect information in the affidavit is the product of the affiant's lies or reckless disregard for the truth. *People v. Dailey, supra,* at p. 1073-74.

To require the defendant to meet this burden without first disclosing the identity of the informant would effectively place him in an impossible situation. In fact, this predicament was recognized specifically by this Court in the *Dailey* case when it said:

> In order to have a fair opportunity to carry this burden, where, as here, the affiant claims reliance on an unnamed informant, the defendant needs an opportunity to inquire of the informant as to the information given by him to the officer and to develop background information bearing on whether the officer was reckless in relying on the informant as a source of information. Under these circumstances, if the defendant cannot learn the identity of the informant, he will be denied information essential to the merits of his suppression motion. .

People v. Dailey, supra, at 1076.

(p. 13) The facts of the instant case are nearly identical to those discussed in the *Dailey* case, and therefore, the rationale and holding of this Court in Part III of that decision should govern the instant appeal.

Judge Roan, in reaching his decision, was clearly cognizant of the correct law to apply to the facts of the instant case. In fact, on pages 16 and 17 of the transcript of the September 9, 1982, hearing, the court quotes extensively from some of the above cited passages of *Dailey* and *Bueno*. (See also Volume I, A, 59-62). It is also clear that his decision is supported by competent evidence.

At the September 9, 1982, hearing, the defendant took the witness stand and testified that he was out of town from October 31 through November 6, 1982 (Vol. I, A, 26-27). The defendant testified further that he had been driving his motor home on this trip (Vol. I, A, 27). This was in contradiction to the confidential informant's statement that during the two weeks preceding the preparation of the affidavit, Mr. Nunez had been seen delivering heroin in his motor home (see second to last full paragraph, page 2 of affidavit for search warrant).

The confidential informant had also testified that he had been present at the home of Mr. Nunez and observed him with a large amount of heroin in his possession which was (p. 14) contradicted by testimony which revealed that only immediate family members were present in the Nunez home at that time. (See third full paragraph of affidavit for search warrant as compared to Vol. II, A, 28-29).

Finally, the confidential informant stated Mr. Nunez had told him that he had just returned from Mexico where he had purchased heroin, which again, was in contradiction with Mr. Nunez' testimony that he had been out of town hunting with his family (see third full paragraph of affidavit for search warrant versus Vol. I (A), 26-27).

Based upon these and other facts adduced at the hearing, the trial court judge ruled that the defendant had made the required initial showing as required by *People v. Bueno,* and *People v. Dailey,* (Vol. II, A, 59-60). Clearly this decision was consistant with law and well within the sound discretion of the trial court judge.

Throughout its brief, the appellants place a great deal of reliance on trial counsel's statements. The appellee would argue that these statements are quoted out of context, do not stand for the proposition cited by the appellant, and have little or no bearing on the instant appeal.

(p. 15) On page 2 of their brief, the appellants state "defense counsel conceded that the credibility of the affidavit, Sgt. DeNovellis, was not at issue." (Opening Brief, 2). On page 5, the following statement appears:

> In the case at bar, defense counsel readily conceded that the affiant's credibility was not at issue.

Opening Brief, 5.

In support of this contention, the appellants refer this court to Volume II, A, 13 of the transcript. On the basis of these alleged statements, the appellants argue that the defendant's Motion for Disclosure of Informant is rendered moot.

In the first instance, the statement referred to by the appellants in their Opening Brief was made in the context of an offer of proof to take the place of the required affidavits for a veracity challenge to a search warrant under *Dailey* (Vol. II, A, 11-17). It is also clear that at the particular point in time the statement was made, defense counsel was cut-off by the court and not allowed to finish his train of thought (Vol. II, A, 13).

After defense counsel was cut-off, the district attorney made a similar argument to the one advanced herein regarding the effect of defense counsel's statement about the credibility of Sgt. DeNovellis (Vol. II, A, 13-15).

(p. 16) Immediately after the district attorney raised that issue, defense counsel clarified his earlier statement indicating that, at that particular point in time, the defendant could only carry his burden on the issue of recklessness but needed disclosure of the informant in order to prove intentional misstatement by the affiant or further support the claim of reckless disregard of the truth (Vol. II, A, 15-16).

This point was further clarified by his statements on pages 20 and 21 of the September 9, 1982, transcript

wherein it was pointed out that he was prepared to present evidence that "would carry the burden that there is a good faith reason to believe what this person said could not have possibly happened and, therefore, I think that it would incumbent upon the court to order disclosure so we could have this alleged informant in court to say, well, I did say this or I didn't say this or I said this and it was changed to this to find out exactly what did happen. Otherwise, how would a defendant . . ." (Vol. II, A, 20-21). These are the exact concerns expressed by this court in the *Dailey* case (cited on page 12 of the instant brief) which lead to the decision that the informant must be disclosed. *People v. Dailey, supra,* at p. 1076.

Finally, defense counsel consistantly impressed upon (p. 17) the court the need to have the confidential informant present at the suppression hearing, should disclosure be ordered, in order to carry the defendant's burden on the veracity challenge contained in the Motion to Suppress (Vol. I, A, 22-24).

VI. CONCLUSION

Based upon the facts and arguments contained above, even if this Court decides that it has jurisdiction of the instant appeal, it is clear that the trial court judge articulated and applied the correct legal standard in reaching his decision on the defendant's Motion to Disclose Informant. Furthermore, it is equally clear that based upon the facts adduced at the September 9, 1982, hearing, the court was well within its discretion in ordering disclosure.

Respectfully submitted,

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(p. 18) CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of defendant-appellee's Answer Brief by placing same in the United States mail, postage pre-paid and properly addressed this 16th day of December, 1982, to Steven L. Bernard, Chief Trial Deputy, 450 South Fourth Avenue, Brighton, Colorado 80601.

/s/ Nancy Thienes
Nancy Thienes

SUPREME COURT, STATE OF COLORADO

Case No. 82SA512

REPLY BRIEF
(Filed December 29, 1982)

THE PEOPLE OF THE STATE OF COLORADO,
Plaintiff-Appellant,

vs.

ANTONIO GUADALUPE NUNEZ,
Defendant-Appellee.

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(p. 1) SUPREME COURT, STATE OF COLORADO

Case No. 82SA512

REPLY BRIEF

THE PEOPLE OF THE STATE OF COLORADO,

Plaintiff-Appellant,

vs.

ANTONIO GUADALUPE NUNEZ,

Defendant-Appellee.

ARGUMENT I

THE COURT CAN REVIEW, IN AN INTERLOCUTORY APPEAL, THE TRIAL COURT'S DECISION TO ORDER THE PROSECUTION TO DISCLOSE THE INFORMANT'S IDENTITY.

Normally, an accused's request for disclosure arises in two different situations which may produce two different sanctions. First, a person charged with an offense may argue that an informer was a witness to the event that formed the basis of the charge. If the court finds that the informer's identity should be disclosed, and if the prosecution refuses to reveal that person's name, then the court may dismiss the charge. *People v. Bueno,* 646 P. 2d 931 (Colo. 1982); *People v. Musgrave,* 187 Colo. 135, 529 P. 2d 313 (1974).

Second, an accused may ask a court to order the prosecution to reveal an informer's identity so that the informer can be questioned about the information, incorporated in a search warrant's affidavit, that he gave to the affiant. If the accused satisfies certain necessary factual predicates, then the court may order the prosecution to disclose the informer's name. If the prosecution

refuses to comply with the court's order, then the court may delete from the affidavit the statements attributed to the informant. Then, if the affidavit no longer contains probable cause to believe that the accused committed a crime (p. 2) or that the evidence will be found in the place to be searched, the court may suppress the items seized pursuant to the warrant. *People v. Dailey,* 639 P. 2d 1068 (Colo. 1982).

In *People v. Dailey, supra,* the accused requested that a District Court suppress evidence seized from his home pursuant to a search warrant. Noting that the affidavit contained statements attributed to a confidential informant, the accused also asked that the court order the prosecution to reveal the informer's name so that the defense could question him. The District Court granted both of these motions. In reversing the District Court's decision to suppress the evidence, this Court discussed the limits of Interlocutory Appeals taken by the prosecution pursuant to C.A.R. 4.1.

When he examined C.A.R. 4.1, Justice Lohr wrote at 1076 that this Court may review orders which, by themselves, might be outside of the Rules' requirements, but, when coupled with another reviewable order, become a proper subject for consideration in an Interlocutory Appeal. This principle was then applied in *Dailey.* The District Court's decision to suppress the evidence clearly could be reviewed in an interlocutory proceeding. Because the order requiring disclosure of the informant's name was "intimately related" to the suppression order, Justice Lohr wrote that this Court could also review that decision in the Interlocutory Appeal.

In this case, the defendant filed a motion to suppress the evidence seized from his residence, alleging that the search warrant that authorized the seizure was not supported by probable cause. (Vol. I, 6-7). Defense counsel stated that he wished to know who the informant was so that counsel could supboena [sic] him/her to testify at the suppression hearing. (Vol. II, A, 22-24). In its written order, the trial court referred to the search warrant and (p. 3) summarized the statements attributed to the confidential informant. That court also noted that the defendant's request for a disclosure order was designed, in part, to challenge the search warrant. (Vol. I, 8-9). After the prosecution stated that it would not disclose the informer's name, the trial court suppressed the evidence "which is the subject of the Defendant's Motion to Suppress . . ." (Vol. I, 10). In fact, the trial court ruled at one point that the informant's identity should be disclosed only for purposes of the suppression hearing, not for use at trial. (Vol. II, A, 63).

This case is factually similar to *Dailey*. Here, the defendant sought to have evidence seized from his home suppressed. Unlike the accused in *People v. Musgrave, supra,* the defendant did not present any evidence that the informant was a witness to the acts upon which the charge was based. Therefore, the defense did not establish any grounds upon which the trial court could rest a decision to dismiss this case. The sanction that the trial court imposed was the sanction that the defendant requested: suppression of the evidence seized from him while he was in his home. This decision could only have been based on the trial court's finding that, without the information obtained from the informant, the affidavit

no longer established probable cause. As *Dailey* indicates, since the trial court's disclosure order was intricately intertwined with its suppression order, this Court may review both decisions pursuant to C.A.R. 4.1.

ARGUMENT II

BECAUSE THE DEFENDANT DID NOT PRESENT ANY EVIDENCE THAT THE AFFIANT LIED OR RECKLESSLY DISREGARDED THE TRUTH, THERE WAS NO BASIS FOR THE TRIAL COURT TO ORDER THE PROSECUTION TO DISCLOSE THE INFORMANT'S IDENTITY.

Both this Court and the United States Supreme Court have repeatedly (p. 4) recognized that confidential informers can provide the prosecution with invaluable information that can lead to just criminal convictions. In many cases, convictions would be impossible without information from such sources. Without the protection of confidentiality, many people would never tell the police what they know because they would fear that an accused would seek retribution.

Courts have balanced this need for anonymity against the accused's rights. A court may order the prosecution to reveal an informer's identity, but this order must be preceded by a factual demonstration by the accused that disclosure of the informant's name is necessary to a proper resolution of the case. *People v. Bueno, supra.* This requirement that the accused bears an initial burden before a court will order disclosure of an informant's name is designed to preserve an informer's anonymity unless and until the accused provides an adequate reason to dispense with that protection. Without this burden, an accused, prompted either by good or evil intentions, would always request that an informant's name be re-

vealed. Unable to read the accused's mind in order to divine his purpose, a court would almost always have to presume that the request was made in good faith and then order the prosecution to produce the informer's name. *McCray v. Illinois,* 386 U.S. 300 (1967). Because this chain of events would effectively destroy confidentiality, an accused must meet his initial burden so that a court may determine if the disclosure request is made for a reason involving the fairness of a criminal proceeding as opposed to one based upon the accused's appetite for vengeance.

When the defense asks a court to order the state to reveal the identity of an informer who provided information contained in a search warrant's affidavit, he must first make some factual showing that the *affiant* lied or recklessly disregarded the truth when he included the informant's statement in (p. 5) the affidavit. *McCray v. Illinois, supra,* at 307-308; *People v. Bueno, supra.* In quoting the United States Supreme Court, this Court explained that burden in *People v. Dailey, supra,* at 1074:

> [T]he defendant [must make] a *substantial* preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the *affiant* in the warrant affidavit . . . (Emphasis supplied).

Although the defendant attempts to avoid the consequences of his counsel's statements (Defendant's Brief, 14-16), it is clear that the focus of his argument was aimed at whether the informant had lied and not at the informant's veracity. Not only did defense counsel concede that he was not impugning Sergeant DeNovellis' credibility (Vol. II, A, 13), but he later admitted that he

was attacking "the veracity of the informant." (Vol. II, A, 21). In fact, the trial court adopted the position that the affiant's credibility was not at issue. (Vol. II, A, 18).

These statements lead to two conclusions. First, the record does not contain any testimony that indicates that the affiant lied or recklessly disregarded the truth. Therefore, there is no factual basis for the trial court's disclosure order. Second, because neither the trial court nor the defendant felt that the affiant's veracity was at issue, the defense could not, as a matter of law, meet its burden. *See, People v. Woods,* 175 Colo. 34, 485 P. 2d 491 (1971). Therefore, since the defendant could not make the necessary preliminary showing, there was no support in the record for the trial court's decision to order the prosecution to disclose the informant's identity.

Once an accused satisfies his initial burden, then a court's decision to order the government to produce the informer's name is normally within its sound discretion. However, when that decision is not based upon facts, then (p. 6) this Court will reverse that decision. *People v. Bueno, supra.* Here, not only is the record devoid of any evidence to suggest that the affiant acted improperly, but both the defendant and the court stated that they did not doubt the affiant's credibility. Therefore, as an issue of fact, the trial court's decision was unsupported by evidence. As a matter of law, once the trial court found that the affiant's credibility was no longer an issue, it could not proceed to order disclosure because the necessary legal predicate had not been established. Because the trial court based its suppression order on its erroneous

decision to order the prosecution to reveal the informant's identity, both those decisions should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on the 28th day of December, 1982, a true copy of the Reply Brief was deposited in the U.S. Mail at Adams County, Colorado, postage prepaid, in a securely sealed envelope, addressed to:

Kenneth H. Stern, Esq.
1760 Lafayette Street
Denver, CO 80218

/s/ Karyl Tudehope

IN THE SUPREME COURT OF COLORADO

No. 82SA512

THE PEOPLE OF THE STATE OF COLORADO,
Plaintiff-Appellant,

v.

ANTONIO GUADALUPE NUNEZ,
Defendant-Appellee.

Interlocutory Appeal from the District Court
of Adams County

Honorable Philip F. Roan, Judge

EN BANC ORDER AFFIRMED

February 22, 1983

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Steven L. Bernard, Chief Trial Deputy
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JUSTICE DUBOFSKY delivered the Opinion of the Court.

In this interlocutory appeal under C. A. R. 4.1, the People seek reversal of the Adams County district court's order suppressing evidence seized during a search of the defendant's house. The suppression order was entered following the district attorney's refusal to disclose the identity of one of the confidential informants upon whose statements the affidavit in support of the search warrent was based, in part. We affirm the suppression order.

On November 7, 1981, police sergeant Don DeNovellis executed an affidavit for a search warrant before a Denver district court judge, who issued a warrant authorizing a search of two motor vehicles and a house at 8690 Norwich Street in Denver. The affidavit stated in part:

> On 11-7-81 your affiant received information from a previously reliable confidential informant, that the said previously reliable confidential informant was

> at the location of 8690 Norwich St. in the past 24 hours of that date (11-7-81) and observed Antonio "Pic" Nunez with a large amount of heroin in his possession. This previously reliable confidential informant further related that Mr. Nunez was in the process of cutting (diluting) the heroin and was also putting the heroin in balloon packages. Mr. Nunez told the previously reliable confidential informant that he had just returned from Mexico and had purchased five ounces of heroin while he was there, bringing the heroin across the Mexico-United States border himself. This previously reliable confidential informant is knowledgeable in the packaging and appearance of heroin and has admitted to your affiant that said informant has used heroin in the past. This previously reliable C. I. has been reliable on at least two occasions within the past 18 months, giving your affiant information involving narcotic activity, and resulting in the recovery of quantity of heroin.

Upon receiving the warrant, narcotics officers searched the house at 8690 Norwich Street and seized 9.6 grams of heroin from the defendant. Nunez was arrested and charged with one count of possession of heroin, a Schedule I controlled substance, in violation of section 18-18-105, C.R.S. 1973 (1978 Repl. Vol. 8, 1982 Supp.).

The defendant filed motions to suppress and for disclosure of confidential informants. No supporting affidavit accompanied either motion. At the motions hearing, the district court granted the defendant's oral motion to amend the motion to suppress and to present an offer of proof in lieu of the supporting affidavits required by *People v. Dailey*, 639 P.2d 1068 (Colo. 1982). The district attorney stated that while he preferred that the affidavits be filed, he would consent to the presentation of the offer of proof in their stead. The court then

took testimony of Nunez' veracity challenge to the statements of the confidential informant. [1]

The defendant testified that he had been on a hunting trip from October 31 until November 6, 1981, and that no one but family members had been in his house on November 6, the date that the confidential informant was supposed to have seen him cutting heroin. The defendant also stated that he had not been to Mexico nor told anyone that he had been to Mexico during the week of October 31 to November 6. Sergeant DeNovellis testified that his informant alleged that he or she had been at Nunez' house on November 6, had seen Nunez with heroin then, and had been told by Nunez about his recent return from Mexico. Given the conflict in testimony, the district court ordered the district attorney to disclose the identity of the confidential informant or face suppression of the evidence seized during the search. When the district attorney refused to divulge the identity of the informant, the court granted the defendant's motion to suppress. [2]

/1 The defendant limited his challenge to that portion of the affidavit set out in text, *supra*. He specifically identified as untrue the allegations that a confidential informant had been at his house on November 6, 1981, and that he had told that person of his recent return from Mexico. The remainder of the affidavit contained the allegations of two other confidential informants, neither of whom specifically attested to having seen the defendant participate in any criminal activity.

/2 The defendant argues that because suppression was ordered as a sanction for nondisclosure and was merely collateral to the disclosure issue, this court lacks jurisdiction to hear the People's interlocutory appeal under C.A.R. 4.1. A ruling granting a defandant's pre-trial motion to suppress is

(Continued on next page)

The People argue that the disclosure of confidential informants is limited to situations in which the veracity of the affiant-police officer is successfully attacked. This contention misapprehends the holding of *People v. Dailey*. *Dailey* recognized that errors in an affidavit for a search warrant can result "from the informant's perjury or reckless disregard for the truth, or from the negligence or good faith mistake of either the officer or the informant." 639 P. 2d at 1075. When, following a veracity hearing, the probability of one of those kinds of error has been found, the election of remedies or sanctions is left to the discretion of the district court. The necessary foundation for the court's exercise of discretion in ordering disclosure is a showing of a reasonable basis in fact to question the accuracy of the informant's recitals. *People v. Martinez,* — P. 2d — (Colo. 1983) (No. 82SA294, announced February 7, 1983) slip op. at 5; *People v. Bueno,* 646 P. 2d 931, 935-6 (Colo. 1982).

Our result in this case follows from *People v. Martinez, supra.*[3] Where the district court has determined

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(Continued from previous page)

subject to interlocutory appear under C.A.R. 4.1 The defendant's contention is controlled by our holding in *People v. Dailey, supra,* where we determined that an order granting the defendant's motion to disclose a confidential informant was "so intimately related" to the order suppressing evidence that it fell within the interlocutory appeal authorization of C.A.R. 4.1. 639 P. 2d at 1076, n. 8.

/[3] We note that here, as in *Martinez,* the defendant failed to comply with the prerequisites of *People v. Dailey* for motions and affidavits filed to seek suppression of evidence seized under a challenged search warrant. The People acquiesced in the waiver of those prerequisites at the hearing, however, and do not raise the point on appeal.

that the defendant has shown a good faith basis in fact to question the accuracy of an affidavit containing recitals based on information supplied by an unnamed informant and consequently has ordered that the informant be disclosed or be produced for an *in camera* hearing,[4] we will not disturb that ruling. When the People refused to disclose the identity of the informant, the district court properly suppressed the evidence seized during the search of the defendant's house.

The order of the district court is affirmed.

/4 The People did not request an *in camera* hearing at which the informant would be present for judicial interrogation in accordance with the guidelines in *Dailey, supra* at 1077, n. 11.

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FILED
AUG 15 1983
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No. 82-1845

In The
Supreme Court of the United States
October Term, 1983

THE STATE OF COLORADO,

Petitioner,

vs.

ANTONIO GUADALUPE NUNEZ,

Respondent.

RESPONDENT'S OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF COLORADO

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No. 82-1845

In The
Supreme Court of the United States
October Term, 1983

THE STATE OF COLORADO,

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RESPONDENT'S OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF COLORADO

OPINION BELOW

The opinion of the Colorado Supreme Court has been attached, as Appendix A, to the Petition for Writ of Certiorari filed by the petitioner in the instant case.

JURISDICTION

This Court is without jurisdiction to review the decision of the Colorado Supreme Court in the case of *The State of Colorado v. Antonio Guadalupe Nunez.*

The decision by the Colorado Supreme Court, in the instant case, is governed and controlled by a decision of the same court in the *People v. Dailey,* 639 P. 2d 1068 (1982). The relationship between *Dailey* and the instant case is also reflected in the Petition itself. (See pages 6-9 of Petition for Writ of Certiorari.) Therefore, in order to ascertain whether this court has jurisdiction herein, the underlying basis and authority for the decision in *Dailey* must be closely examined in the light of case law in this area.

This Court has consistently observed that state courts are entitled to interpret their own constitutions. "It is fundamental that state courts be left free and unfettered by us in interpreting their own constitutions." *Minnesota v. National Tea Company,* 309 U. S. 551, 557 (1940); *Air Pollution Variance Board v. Western Alfalfa Corp.,* 416 U. S. 861 (1974). It is incumbent upon the petitioner to show that there is no independent or adequate state ground for the decision it seeks to challenge in this Court. In the absence of such a showing, the decision of this Court would result in "nothing more than an advisory opinion". *Herb v. Pitcairn,* 324 U. S. 117, 126 (1945).

The fact that a given State Supreme Court has cited federal authority in reaching its decision, does not necessarily lead to the conclusion that the court has not independently evaluated and applied the provisions of its own

constitution. *Jankovich v. Indiana Toll Road Commission,* 379 U. S. 487 (1965).

A close reading of the decision in *Dailey,* indicates it was clearly based upon independent state grounds. The basis for this observation will be set forth more fully in the section of the instant pleading entitled "Reasons for Denying the Writ".

Should this court determine, however, that it is unclear whether the Colorado Supreme Court based its opinion on its own constitution, the proper approach would be to remand this case to the Colorado Supreme Court for further proceedings and clarification of its opinion. *Air Pollution Variance Board v. Western Alfalfa Corp.,* 416 U. S. 861 (1974); *California v. Krivda,* 409 U. S. 33 (1932); *Mental Hygiene Department v. Krichner,* 380 U. S. 194 (1965).

STATEMENT OF THE CASE

On November 7, 1981, members of the Denver Police Department obtained a search warrant to search the premises and motor vehicles located at 8690 Norwich Street, Adams County, Colorado. The search warrant was based upon information from three confidential informants. The search warrant was executed on November 7, 1981, and during the execution of same 15 balloons were allegedly found in the pocket of the defendant Mr. Nunez. Inside the balloons, a substance was allegedly discovered which was later analyzed and found to be heroin. Based upon the evidence recovered from the search of Mr. Nunez's

pockets, the defendant was charged in a one count information with possession of a controlled substance, Schedule I in violation of C. R. S. 1973, § 12-22-3309 and § 18-18-105(2) (a) as amended.

The defendant was arraigned on February 2, 1982, and on February 25, 1982, the defendant filed the following motions: Motion to Suppress, Motion to Disclose Informant, Motion for Disclosure of Deals and/or Compensation. On September 9, 1982, a hearing was held on the defendant's motions.

It must be noted that the only motion ever adjudicated, *on the merits,* was the Motion to Disclose Informant. At the beginning of the September 9, 1982, hearing, counsel for the defendant had requested adjudication of this motion first so, in the event that it was granted, he could subpoena the confidential informant for the hearing on the merits of the Motion to Suppress.

The court never reached the defendant's Motion to Suppress on the merits. Rather, this motion was granted on October 12, 1982, after the district attorney had informed the court that he would not disclose the identity of the confidential informant despite being ordered to do so by the Trial Court Judge on October 7, 1982. On that date, the Trial Court Judge entered written Findings of Fact, Conclusions of Law, and Order regarding the Motion for Disclosure of Informant in which he granted same. On October 18, 1982, the appellant filed their Notice of Interlocutory Appeal pursuant to Colorado Appellate Rules 4.1.

The statement made by the petitioner in the "Statement of the Case" portion of its Petition for Writ of Cer-

tiorari, to wit: that defense counsel conceded that the credibility of the affiant of the search warrant, Sgt. Denovolis was not at issue, mischaracterizes the proceedings before the Trial Court Judge. The statement alluded to by the petitioner was made in the context of an offer of proof and was clarified at a later point when counsel for the defendant stated that disclosure of the informant was necessary in order to prove the affiant's intentional misstatements or reckless disregard of the truth in preparing the affidavit. (See portion of instant pleading entitled "Reasons for Denying the Writ".)

REASONS FOR DENYING THE WRIT

In its Petition for Writ of Certiorari, the petitioner misstates the issue presented by the instant case. The decision of the Colorado Supreme Court does not state that a defendant may successfully challenge the veracity of an affidavit, given in support of a search warrant, by proving that the informant gave false information or is incredible. Rather, the issue presented by the instant case is: To have an adequate opportunity to present evidence in support of a veracity challenge, what showing must a defendant make in order to have the identity of a confidential informant disclosed?

In the instant case, similar to the facts presented in the *Dailey* case, the respondent sought to challenge the affidavit that formed the basis for the granting of a search warrant. The defendant was moving to strike certain allegations contained in the affidavit, based upon their

lack of veracity and trustworthiness. The respondent also argued that should these allegations be stricken, the affidavit was insufficient to establish probable cause.

The *Dailey* case, which governs the decision in the instant case, does not stand for the proposition that a defendant may successfully strike allegations from an affidavit during the course of a veracity challenge, based on the *informant's* truthfulness or credibility. In fact, the Colorado Supreme Court considered such a situation and declined to rule on it.

> We do not agree with the trial court's assumption that all false information in an affidavit for search warrant must be stricken without regard to the source of the error, before determining its (the affidavit) sufficiency to establish probable cause. If the error resulted from perjury or reckless disregard for the truth on the part of the affiant-officer, the Fourth Amendment requires that the incorrect statements be stricken. *Frank v. Delaware, supra.* The errors, however, could have resulted from the informant's perjury or reckless disregard for the truth or from the negligence or good faith mistake of either the officer or the informant. Other sources of error can be imagined. *We consider it inadvisable to attempt to develop the consequences which would flow under the United States and Colorado Constitutions from each of the various possibilities as to the origin of the error.*

Dailey, 639 P. 2d at 1074. (Parenthesis and emphasis added.)

In addition to not even reaching the issue raised by the petitioner in its Petition for Writ of Certiorari, it is clear from this passage that the decision in the *Dailey*

case is predicated on both the United States *and* Colorado Constitutions.

In both the *Dailey* case and the instant case, therefore, the Colorado Supreme Court required a criminal defendant, in the context of a veracity challenge in a Motion to Suppress evidence, to prove that the affiant-officer committed perjury or was guilty of a reckless disregard for the truth. The issue raised in the *Dailey* case which was germane to the proceedings in the instant case is: Should a defendant, after making a proper showing, be able to obtain disclosure of the identity of an informant for the purpose of conducting a veracity challenge? In that regard, the Colorado Supreme Court, in *Dailey,* stated:

> As we have seen, the Fourth Amendment mandates an excision of an erroneous statement in an affidavit for search warrant if the defendant can show by a preponderance of the evidence that the error in the affidavit for search warrant was caused by an officer-affiant's perjury or reckless disregard for the truth. *Frank v. Delaware, supra.* In order to have a fair opportunity to carry this burden, where, as here, the affiant claims reliance on an unnamed informant, the defendant needs an opportunity to inquire of the informant as to the information given by him to the officer and to develop background information bearing on whether the officer was reckless in relying on the informant as a source of information. Under these circumstances, if the defendant cannot learn the identity of the informant, he will be denied information essential to the merits of his suppression motion.

Dailey, 639 P. 2d at 1076.

In determining whether the identity of the informant should be disclosed for the purpose described above, the

Supreme Court of Colorado, in *Dailey*, prescribed the use of a balancing test. *Dailey*, 639 P. 2d at 1077.

The balancing test discussed in *Dailey* was further defined in a subsequent decision by the Colorado Supreme Court. In *People v. Bueno*, 646 P. 2d 931 (1982), another decision relied upon as authority in the instant case, the Colorado Supreme Court stated that disclosure of an informant is *not* an automatic process. Rather, "a defendant seeking disclosure must make an initial showing that the informant will provide information essential to the merits of his suppression ruling". *Bueno*, 646 P. 2d at 935. The court went on to describe the type of showing that needs to be made:

> Thus, a defendant will meet this initial burden when he establishes a reasonable basis in fact to believe that an informer does not exist or, if he does, he did not relate to the police the information upon which the police purportedly relied as probable cause for an arrest or search. Disclosure in such cases not only safeguards the defendant's right to be free from an unlawful arrest or search but also protects the judicial process itself against abuse by false affidavit of testimony.

Bueno at 936.

It is left to the sound discretion of a trial judge to employ this standard in determining whether the proper showing has been made to require the disclosure of the informer's identity for the purpose of *conducting* the veracity challenge to the affidavit. *Dailey*, 639 P. 2d at 1077. In the instant case, there has been no allegation that the trial court judge did not apply the proper stand-

ard or that his decision constituted an abuse of discretion or was unsupported by the evidence.

As was indicated earlier, the trial court never reached the defendant's veracity challenge in the context of his Motion to Suppress. Rather, the prosecutor refused to divulge the identity of the confidential informant and therefore the suppression hearing never went forward. On a number of occasions, the petitioner asserts that counsel for the respondent and the trial court judge stated that the credibility of the affiant-officer was not an issue. This argument has been raised by the petitioner at every level of the proceedings and has not been accepted by any judicial body. This allegation simply does not comport with the facts.

In the first instance, the statements attributed to counsel for the respondent were made in the context of an offer of proof. At the time the statement was made, the defense counsel was cut-off by the court and not allowed to finish his train of thought.

After defense counsel was cut-off, the District Attorney made an argument similar to the one advanced herein, to wit: that the respondent is not challenging the credibility of the affiant-officer. Immediately after the district attorney raised this issue, defense counsel clarified this misunderstanding regarding his earlier statement. He indicated that, *at this particular point in time,* the defendant could only carry his burden on the issue of the recklessness of the affiant but needed the disclosure of the informant in order to prove an intentional misstatement by the affiant or to further support the claim regarding his reckless disregard of the truth. This posi-

tion taken by counsel for the respondent was reiterated at further points in the hearing.

The sentiment expressed by defense counsel, that he needed disclosure of the informant in order to further document his claim regarding the affiant's misstatements or reckless disregard of the truth, are fully consistent with the concerns expressed by the court in *Dailey* regarding the need of a defendant to have this information in order to conduct his veracity challenge.

In dicta in the *Dailey* case, the Colorado Supreme Court discussed the consistency of its holding with decisions rendered by federal courts interpreting the United States Constitution.

> *Frank v. Delaware, supra,* prescribes the circumstances under which a veracity hearing must be held in order to comply with the Fourth Amendment. It does not prohibit such hearings based upon lesser threshold showings nor of course does it treat the question whether our state constitution requires such a hearing upon some lesser showing of probable merit. See Colorado Const. Art. II, § VII. We consider it appropriate that the defendant show some good faith basis in fact to question the accuracy of an affidavit for search warrant before a veracity hearing may be held.

Dailey, supra, at 1074.

Even though the Colorado Supreme Court's holding in *Dailey* and the instant case did not alter the holding in *Frank v. Delaware,* it is clear that the court's entire consideration of this issue was based, in significant part, upon an interpretation of the Colorado Constitution.

CONCLUSION

Based upon the arguments contained herein, this Court does not have jurisdiction to hear the instant case since the decision rendered below was based upon independent state grounds. Furthermore, the decision of the Colorado Supreme Court is not in variance with case law set forth by this Court and therefore the Petition for a Writ of Certiorari should not be granted.

Respectfully submitted,

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No. 82-1845

In The
Supreme Court of the United States
October Term, 1983

THE STATE OF COLORADO,

Petitioner,

vs.

ANTONIO GUADALUPE NUNEZ,

Respondent.

RESPONDENT'S MOTION TO DISMISS WRIT FOR WANT OF JURISDICTION

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No. 82-1845

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THE STATE OF COLORADO,

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RESPONDENT'S MOTION TO DISMISS WRIT FOR WANT OF JURISDICTION

COMES NOW the respondent, by and through his attorneys, KARP, GOLDSTEIN & STERN, and moves this Court to dismiss the Writ of Certiorari, previously granted, for want of jurisdiction and as grounds therefore states the following:

1. On October 3, 1983, this Court entered its Order granting the petitioner's Writ of Certiorari.

2. Subsequent to that time, the respondent became aware that this Court, pursuant to 28 U. S. C. § 1257(3), does not have jurisdiction to hear the instant case, which arises from an interlocutory appeal Pre-trial Order in a state criminal case.

3. Attached hereto as Appendix A is a complete set of the Minute Orders entered by the Honorable Phillip F. Roan, District Court Judge, which pertain to the instant case.

These Minute Orders, along with the Appendices attached to the petitioner's Petition for Writ of Certiorari, indicate the following:

a. On October 7, 1982, Judge Roan entered an order requiring the District Attorney to disclose the identity of the confidential informant and, failing that, to suppress evidence seized pursuant to a search warrant. App. to Pet. for Cert. A-18 through A-22.

b. Subsequent thereto, the petitioner took an *interlocutory* appeal to the Colorado Supreme Court pursuant to Colorado Appellate Rules, Rule 4.1, App. to Pet. for Cert. A-25.

c. On February 22, 1983, the Supreme Court of the State of Colorado issued its opinion affirming the decision of the District Court Judge, App. to Pet. for Cert. A-1 through A-10.

d. Subsequent thereto, the petitioner filed a Motion to Recall and to Stay Remittitur to the Supreme Court of the State of Colorado, App. to Pet. for Cert. A-25 through A-27. The Colorado Supreme Court denied this motion, A-34, and the case was returned to the jurisdiction of the District Court.

e. Subsequent thereto, the petitioner filed a Motion to Stay Proceedings before the District Court, App. to Pet. for Cert. A-30 through A-33. This Order was

granted by the District Court Judge, over the objection of the respondent. App. to Pet. for Cert. A-33 through A-34, and Appendix to Motion to Dismiss for Want of Jurisdiction, hereinafter referred to as "Appendix" A-1.

f. Since March 9, 1983, the District Court has scheduled three appearances to review the status of the pending appeal to United States Supreme Court, Appendix A-1.

g. On June 30, 1983, counsel for the respondent registered his continuing objection to the suspended status of the instant case. Appendix A-1.

4. As the chronology set forth above indicates, there has been no final decision or judgment in the state court. Therefore, pursuant to 28 U. S. C. § 1257(3), this Court does not have jurisdiction to hear the instant case.

ARGUMENT

Pursuant to 28 U. S. C. § 1257(3), this Court does not have jurisdiction to hear the instant case in that a final judgment has not been rendered in the state court.

Pursuant to 28 U. S. C. § 1257(3), before the United States Supreme Court may review state court cases by Writ of Certiorari, there must be a "final judgment" from the state courts:

> 'It must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. It must be the final word of the final court.'

Market Street R.C.O. Railroad Commission, 324 U. S. 548, 551.

Supreme Court Practice, Stern and Gressman (5th Ed. 1978) at 173. Section 1257 reflects Congress' position against "interlocutory or 'piecemeal' appeals and courts have consistently given effect to that policy". *Abney v. United States,* 431 U. S. at 657.

The prohibition against interlocutory or "piecemeal" appeals is particularly strong in the criminal context since such appeals are especially inimical to the effective and fair administration of the criminal law. *DiBella v. United States,* 369 U. S. 121 (1962). Moreover, the prohibition as regards state cases—unlike cases from the Federal Courts of Appeal—is statutory not jurisprudential. *Compare* 28 U. S. C. 1254(1) with 28 U. S. C. 1257(3).

Generally speaking, in criminal cases final judgment is entered at the time of sentencing. *Supreme Court Practice, supra,* at 195. *Berman v. United States,* 302 U. S. 211 and *Bateman v. United States,* 429 U. S. 1302. The instant case is still pending before the district court for the state of Colorado and no trial has yet taken place. The petitioner seeks review of a decision by the Colorado Supreme Court on an *interlocutory appeal* taken from the ruling of the district court judge suppressing evidence in response to the petitioner's failure to disclose the identity of a confidential informant. This Court has specifically held that the denial of a motion to suppress evidence is not a "final judgment or decree" for the purpose of establishing jurisdiction. *DiBella v. United States, supra; Cogen v. United States,* 278 U. S. 221 (1929).

In only two criminal cases has this court found an exception to the prohibition against reviewing appeals of

pre-trial orders. *Abney v. United States, supra; Stack v. Boyle,* 342 U. S. 1 (1951). In each case, the court's decision was based upon the "collateral order" exception created in *Cohen v. Beneficial Industrial Loan Corporation,* 377 U. S. 541 (1949). In *Abney v. United States, supra,* this Court summarized the three-step analysis of the "collateral order" exception to the finality rule:

> First, the district court's order had fully disposed of the question of the state security statute's applicability in federal court; in no sense, did it leave the matter 'open, unfinished or inconclusive.' [337 U. S. at 546].
>
> Second, the decision was not simply a 'step toward final disposition of the merits of the case [which would] be merged in final judgment'; rather, it resolved an issue completely collateral to the cause of action asserted. *Ibid.*
>
> Finally, the decision had involved an important right which would be 'lost, probably irreparably' if review had to await final judgment; hence, to be effective, appellate review in that special, limited setting had to be immediate. *Ibid.*

Abney v. United States, 431 U. S. at 658-659.

The pre-trial motions which formed the basis of the decisions in *Abney v. United States, supra,* and *Stack v. Boyle, supra,* do not support jurisdiction here. To the contrary, the case of *Abney v. United States, supra,* the Court, while ruling that jurisdiction was proper in the context of a Motion to Dismiss for double jeopardy grounds, distinguished that situation from suppression rulings, relying on *DiBella v. United States, supra,* and *Cogen v. United States, supra. Abney v. United States,* 431 U. S. at 661.

Subsequent to its decision in *Abney*, this Court addressed the issue of whether a motion to dismiss on speedy trial grounds fits within the "collateral order" exception to the finality rule. In its decision, this Court strictly limited the applicability of this doctrine in criminal matters. *United States v. McDonald*, 435 U. S. 858 (1968).

In a recent pronouncement this Court again endorsed the general rule that the Court will only hear those state cases in which a final judgment has been rendered which, in the criminal context, means the imposition of sentence. *Flynt v. Ohio*, 451 U. S. 619 (1981).

CONCLUSION

There can be no dispute that the criminal action filed by the petitioner against the respondent is still pending in the state court system. Therefore, there has been no "final judgment or decree" as said term is set forth in 28 U. S. C. § 1257(3) and this court does not have jurisdiction to proceed with the instant case.

Respectfully submitted,

KARP, GOLDSTEIN & STERN

By: KENNETH H. STERN (9198)

1763 Franklin Street
Denver, Colorado 80218
(303) 861-8580

Attorney for Respondent

APPENDIX "A"

5 82 000025
03-09-83
PFR

PEO. V. ANTONIO NUNEZ
MOTION TO STAY PROCEEDINGS
HON. PHILIP F. ROAN
REPORTER: LESLIE MAES

APPEARING: STEVEN BERNARD, DDA. KENNETH STERN, ATD. DEFENDANT NOT PRESENT. THE COURT HEARD STATEMENTS OF COUNSEL.
ORDER: THE COURT WILL GRANT THE PEOPLE'S MOTION TO STAY PROCEEDINGS. THE MATTER IS CONTINUED FOR REVIEW ON MAY 2, 1983 AT 8:30 A.M. WHICH DATE IS A BOND RETURN DATE FOR THE DEFENDANT.

5 82 000025 05-02-83
05-02-83
PFR

PEO. V. ANTONIO NUNEZ
REVIEW APPEAL STATUS
HON. PHILIP F. ROAN
REPORTER: MARY ANN BISHOP

APPEARING: STEVEN BERNARD, DDA. KENNETH STERN, ATD. DEFENDANT ON BOND. THE SUPREME COURT HAS NOT RULED ON THE APPEAL YET.
ORDER: THE MATTER IS CONTINUED FOR REVIEW OF APPEAL STATUS ON JUNE 30, 1983 AT 8:30 A.M. DEFENDANT'S BOND IS CONTINUED.

5 82 000025 07-01-83
06-30-83
PFR

PEO. V. ANTONIO G. NUNEZ
REVIEW APPEAL STATUS
HON. PHILIP F. ROAN
REPORTER: MARY ANN BISHOP

APPEARING: STEVEN BERNARD, DDA. KENNETH STERN, ATD. DEFENDANT IS ILL IN THE HOSPITAL AND NOT PRESENT. ATD MAKES CONTINUING OBJECTION TO THE SUSPENDED STATUS OF THE CASE.
ORDER: BENCH WARRANT SHALL ISSUE FOR THE ARREST OF THE DEFENDANT, CITATION TO SURETY. STAY OF EXECUTION UNTIL SEPTEMBER 8, 1983 AT 8:30 A.M. THE

5 82 000025 09-15-83
09-08-83
PFR

PEOPLE V. ANTONIO NUNEZ
REVIEW STATUS OF APPEAL AND STAY ON B/W
HON. PHILIP F. ROAN
REP: MARY ANN BISHOP
APPEARING: STEVEN BERNARD, DDA, SHELLY DODGE FOR KENNETH STERN, ESQ WITH THE DEFENDANT WHO IS PRESENT ON BOND.
ORDER: ORDER FOR BENCH WARRANT IS QUASHED AND MATTER CONTINUED TO NOVEMBER 21, 1983 AT 8:30 A.M. FOR REVIEW OF APPEAL. DEFENDANT'S BOND WILL CONTINUE.

5 82 000025 10-05-82
10-04-82
PFR

PEO. V. ANTONIO G. NUNEZ
REVIEW—STAY BENCH WARRANT
HON. PHILIP F. ROAN
REPORTER: LESLIE MAES
APPEARING: JEFF ROMEO, DDA. KENNETH STERN WITH DEFENDANT ON BOND. THE COURT HAS REVIEWED THE PROPOSED FINDINGS OF FACT SUBMITTED BY COUNSEL FOR THE DEFENDANT.
ORDER: THE BENCH WARRANT IS VACATED. THE COURT WISHES TO ENTER ITS OWN FINDINGS AND WILL DO SO BY FRIDAY OF

THIS WEEK. THE TRIAL DATE OF OCTOBER 27, 1982 AT 9:00 A.M. WILL REMAIN THE BOND RETURN FOR THE DEFENDANT.

5 82 000025 11-01-82
10-27-82
PFR

PEO. V. ANTONIO G. NUNEZ
RE-SET TRIAL
HON. PHILIP F. ROAN
REPORTER: LESLIE MAES

APPEARING JEFF ROMEO, DDA. KENNETH E. STERN WITH DEFENDANT ON BOND. AN INTERLOCUTORY APPEAL HAS BEEN FILED. ORDER: THE MATTER IS SET FOR REVIEW ON JANUARY 14, 1983 AT 8:30 A.M. DEFENDANT'S BOND IS CONTINUED.

5 82 000025 01-19-83
01-14-83
PFR

PEO. V. ANTONIO G. NUNEZ
REVIEW—APPEAL STATUS
HON. PHILIP F. ROAN
REPORTER: LESLIE MAES

APPEARING: BRUCE LEVIN, DDA. KENNETH STERN, ATD. DEFENDANT ON BOND. THE COURT IS ADVISED THAT THE COURT OF APPEAL HAS NOT MADE A DECISION ON THE APPEAL.
ORDER: THE MATTER IS CONTINUED FOR REVIEW OF APPEAL STATUS UNTIL MAY 2, 1983 AT 8:30 A.M. DEFENDANT'S BOND IS CONTINUED UNTIL THAT TIME.

5 82 000025 03-10-83
03-08-83
PFR

PEO. V. ANTONIO G. NUNEZ
SET PETITION TO SAY PROCEEDINGS
HON. PHILIP F. ROAN
(OFF RECORD)

KENNETH STERNS, ATD TELEPHONED THE COURT ADVISING HE WOULD BE UNABLE TO BE PRESENT 3/10/83 FOR SETTING. STEVE BERNARD HAS NO OBJECTION TO SETTING BY PHONE.
ORDER: THE PEOPLE'S MOTION TO STAY PROCEEDINGS IS SET FOR HEARING MARCH 9, 1983 AT 8:30 A.M. SETTING 3/10/83 IS VACATED.

5 82 000025
06-21-82
PFR

PEO. V. ANTONIO G. NUNEZ
BOND RETURN

HON. PHILIP F. ROAN
REPORTER: LESLIE MAES

APPEARING: JEFF ROMEO, DDA. K. STERN PRESENT WITH THE DEFENDANT ON BOND. ORDER: THIS IS A BOND RETURN DATE ONLY. THE DEFENDANT IS ADVISED THAT THE MATTER HAS BEEN SET FOR HEARING ON MOTION TO SUPPRESS ON JULY 22, 1982 AT 1:30 P.M. AND SET FOR JURY/TRIAL/12 ON OCTOBER 27, 1982 AT 9:00 A.M. DEFENDANT'S BOND WILL CONTINUE.

5 82 000025 07-26-82
07-22-82
PFR

PEO. V. ANTONIO G. NUNEZ
MOTIONS

HON. PHILIP F. ROAN
REPORTER: LESLIE MAES

APPEARING: JEFF ROMEO, DDA. K. STERN FOR THE DEFENDANT. COUNSEL REQUESTS A CONTINUANCE OF THE MOTION'S HEARING. ORDER: THIS HEARING IS VACATED. THE MATTER IS SET FOR HEARING ON SEPTEMBER 9, 1982 AT 3:00 P.M. DEFENDANT'S BOND WILL CONTINUE.

5 82 000025 09-10-82
09-09-82
PFR

PEOPLE V. ANTONIO NUNEZ
MOTIONS

HON. PHILIP F. ROAN
REPORTER: LESLIE MAES

APPEARING: JEFF ROMEO, DDA; KENNETH H. STERN, ATD, W/DEF ON BOND. IN THE MOTION TO RETURN PROPERTY AND HE WOULD ASK THAT THIS MOTION NOT BE HEARD AT THIS TIME.
MOTION FOR DISCLOSURE OF INFORMANT RATHER THAN CONTINUE THIS HEARING PEOPLE WILL WAIVE THE PRESENTATION OF AFFIDAVITS AND ACCEPT COUNSEL'S OFFER OF PROOF IN THEIR STEAD. WITNESSES ARE SEQUESTERED, WITH DON DENOVELLIS AS THE PEOPLE'S ADVISORY WITNESS. THE COURT HEARS THE TESTIMONY OF ANTONIO G. NUNEZ, DON DENOVELLIS AND JEFFREY E. RUETZ. THE COURT FINDS THAT SEAN NUNEZ DOES NOT COMPREHEND THE OATH AND MAY NOT TESTIFY.
FINDINGS AND ORDER: AFTER HEARING THE TESTIMONY OF THE WITNESSES AND THE ARGUMENTS OF COUNSEL THE COURT FINDS THAT DAILEY AND BUENO REQUIRE THE COURT TO ORDER THE PEOPLE TO DISCLOSE THE IDENTITY OF THE INFORMANT. CAUSE IS CONTINUED FOR REVIEW AND SETTING OF THE MOTION TO SUPPRESS ON SEPTEMBER 24, 1982 AT 8:30 A.M. DEF'S BOND WILL CONTINUE UNTIL THAT DATE.

5 82 000025 09-24-82
09-24-82
PFR

PEO. V. ANTONIO NUNEZ
MOTIONS

HON. PHILIP F. ROAN
REPORTER: LESLIE MAES

APPEARING: JEFF ROMEO, DDA. KENNETH STERN FOR DEFENDANT. DEFENDANT IS NOT PRESENT BEING IN TRIAL IN DENVER. COUNSEL REQUESTS A RULING. ORDER: A BENCH WARRANT SHALL ISSUE FOR THE ARREST OF THE DEFENDANT. STAY OF EXECUTION UNTIL OCTOBER 4, 1982 AT 8:30 A.M. THE COURT WILL NOT RULE AT THIS TIME ON THE MOTION TO SUPPRESS.

82CR0025

PEOPLE V. ANTONIO G. NUNEZ

02-02-82

Arraignment

Hon. Philip F. Roan
Reporter: Leslie Maes

Appearing: Jeff Romeo, DDA for the People. Jeff Goldstein for Ken Stern, ATD with the Defendant on bond. The Defendant will waive formal reading of the Information. The Defendant tenders a plea of "Not Guilty" to the charge in the Information—Possession of a Controlled Substance, Schedule I. Defendant requested 20 days in which to file motions. The DDA tendered the standard M/Disclosure.
ORDER: The Court will accept the plea of "Not Guilty". The Defendant shall be permitted 20 days in which to file motions. The hearing on the People's M/Disclosure is set for February 11, 1982 at 8:30 a.m. This matter is set for jury trial—12—on June 21, 1982 at 9:00 a.m. The Defendant's bond will continue.

82CR0025

PEOPLE V. ANTONIO GUADALUPE NUNEZ

02-11-82

HON. PHILIP F. ROAN
(off record)

M/Disclosure—The Court contacted Mr. Stern and was advised that the Defendant had confessed the M/Disclosure by letter. A copy would be furnished to the Court.

ORDER: The M/Disclosure is granted and an Order for disclosure is entered subject to constitutional limitations. The review hearing on February 16, 1982 at 9:00 a.m. is vacated.

82CR0025

PEOPLE V. ANTONIO GUADALUPE NUNEZ

02-11-82

M/Disclosure

HON. PHILIP F. ROAN
REPORTER: LESLIE MAES

Appearing: Jeff Romeo, DDA for the People. The Court is advised that Mr. Stern called the DDA and confessed the Motion for Disclosure. The Court was not advised.

ORDER: The Court would request that the Clerk contact Mr. Stern and advise him to be in Court on February 16, 1982 at 9:00 a.m. in regard to the M/Disclosure.

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5 82 000025 05-19-82

05-19-82

PFR

PEO. V. ANTONIO G. NUNEZ

HON. PHILIP F. ROAN
(off record)

APPEARING: JEFF ROMEO, DDA. KENNETH STERN, ATD. COUNSEL AGREES TO DOCKET THIS MATTER FOR SETTING OF DEFENDANT'S MOTION TO SUPPRESS.

ORDER: THIS MATTER IS PLACED ON THE DOCKET FOR SETTING OF DEFENDANT'S MOTION TO SUPPRESS ON MAY 24, 1982 at 1:30 P.M.

5 82 000025 05-26-82
05-24-82
PFR

PEO. V. ANTONIO G. NUNEZ
SET/MOTION SUPPRESS
HON. MICHAEL A. OBERMEYER
REPORTER: WILLIAM WOODS
APPEARING: JEFF ROMEO, DDA. KENNETH STERN, ATD. DEFENDANT NOT PRESENT. THE COURT IS ADVISED THAT THE DEFENDANT WISHES TO WAIVE HIS RIGHT TO A SPEEDY TRIAL AND VACATE THE JURY TRIAL CURRENTLY SET ON JUNE 21, 1982. COUNSEL FOR DEFENDANT REQUESTS THAT HIS MOTION TO SUPPRESS BE SET FOR HEARING:
ORDER: THE COURT ORDERS THE DEFENDANT TO SUBMIT A WRITTEN WAIVER TO RIGHT OF SPEEDY TRIAL WITHIN (7) DAYS. THE JURY TRIAL SET ON JUNE 21, 1982 WILL BE VACATED AND THE CAUSE RE-SET ON OCTOBER 27, 1982 AT 9:00 A.M. MOTION TO SUPPRESS IS SET FOR HEARING ON JULY 22, 1982 AT 1:30 P.M. JUNE 21, 1982 AT 9:00 A.M. WILL REMAIN A BOND RETURN DATE FOR THE DEFENDANT UNLESS HE APPEARS BEFORE THE COURT BEFORE THAT TIME TO BE ADVISED OF NEW SETTING DATES.

Office-Supreme Court, U.S.
FILED
SEP 15 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1845

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1982

THE STATE OF COLORADO,
Petitioner,

vs.

ANTONIO GUADALUPE NUNEZ,
Respondent.

PETITIONER'S REPLY BRIEF PURSUANT TO UNITED STATES SUPREME COURT RULE 22.5

PAUL Q. BEACOM
District Attorney

STEVEN L. BERNARD
Chief Trial Deputy

Attorneys for Petitioner

450 South Fourth Avenue
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Telephone: (303) 659-7720

The respondent alleges that the trial court's decision in this case was based upon a determination that the affiant lied or recklessly disregarded the truth. [Brief in Opposition, 7-10]. However, the statements made by defense counsel, by the trial court and by the Colorado Supreme Court in its decision demonstrate that the affiant's veracity was not at issue in this case.

Near the beginning of the suppression hearing, defense counsel stated:

> We're not questioning the affiant's credibility, Sergeant DeNovellis' credibility...[Transcript of hearing of September 9, 1982, hereinafter "T." 13].

Later in that hearing, defense counsel attempted to retreat from this absolute statement:

> My statement about Sergeant DeNovellis - I have no information at this point or presented to the

> court he intentionally made any misstatements. I think if we get the confidential informant disclosed and show he was in fact not at the Nunez residence on the 6th, that would get to the heart of the motion to suppress and, second of all, that there was recklessness on the part of the affiant in not verifying the information or checking out the information. [T. 15-16].

However, the trial court then clearly stated that the affiant's truthfulness was not in dispute:

> I'm not concerned about Detective DeNovellis' credibility. I don't think that's in question at all. [T. 18].

The Colorado Supreme Court focused its opinion in this case upon the prosecution's argument that the trial court should not order the State to disclose the informant's identity because both defense counsel and the trial court had conceded that the affiant's credibility was not contested. The Court held:

> The People argue that the disclosure of confidential informants is limited to situations in which the veracity of the affiant-police officer is successfully attacked. This contention misapprehends the holding of People v. Dailey.' Dailey recognized that errors in an affidavit for a search warrant can result "from the informant's perjury or reckless disregard for the truth, or from the negligence or good-faith mistake of either the officer or the informant."...When, following a veracity hearing, the probability of one of those kinds of error has been found, the election of remedies or sanctions is left to the discretion of the District Court. The necessary foundation for the District Court's exercise of discretion in ordering disclosure is a showing of a reasonable basis in fact to question the accuracy of the informant's recitals. [Citation omitted; emphasis supplied] [Petition for a Writ of Certiorari, A-6-7].

In other words, the Colorado Supreme Court held, in opposition to the precedent established by the United States Supreme Court, that a trial court could order the State to disclose an informant's identity even if the accused

only attacked the informant's, and not the affiant's, credibility. Contrary to the respondent's argument (Brief in Opposition, 8-9), this analysis, which was applied in this case, is an improper standard. Although the respondent urges otherwise, defense counsel, the trial court and the Colorado Supreme Court all remove the issue of the affiant's credibility from the calculus that a trial court must follow when it decides whether to disclose a confidential informant's identity. In doing so, the Colorado Court, relying upon the United States Constitution, has erased this Courts's careful historical development of the law that surrounds confidential informants.

Respectfully submitted,

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By _____
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Office - Supreme Court, U.S.
FILED
NOV 18 1983
ALEXANDER L. STEVAS
CLERK

No. 82-1845

In The
Supreme Court of the United States
October Term, 1983

THE STATE OF COLORADO,
Petitioner,

vs.

ANTONIO GUADALUPE NUNEZ,
Respondent.

PETITIONER'S RESPONSE TO MOTION TO DISMISS WRIT FOR WANT OF JURISDICTION

JAMES F. SMITH
District Attorney

STEVEN L. BERNARD
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Attorneys for Petitioner

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ARGUMENT

THIS COURT HAS JURISDICTION TO HEAR THIS CASE.

In his Motion to Dismiss the Writ of Certiorari, which the petitioner received on November 9, 1983, the respondent relies upon a legal principle that does not apply to the case at bar. Citing Abney v. United States, 431 U.S. 651 (1977) and Cohen v. Beneficial Industrial Loan Corporation, 337 U.S. 541 (1949), the respondent urges that this Court cannot consider the petitioner's claim. However, the cases and logic upon which the respondent depends concern decisions appealed pursuant to 28 U.S.C.A. Sec. 1291. The respondent's analysis does not affect petitions, like the one in this case, that are filed pursuant to 28 U.S.C.A. Sec. 1257(3).

In 28 U.S.C.A. Sec. 1291, Congress granted litigants the right to seek appellate review in federal Courts of appeals from final judgments entered by federal district courts. Before Cohen and Abney, the general rule was that a litigaht could not appeal a pretrial order because the statute did not provide for such review. However, those cases held that there were certain exceptions to the general rule, which this Court described as "collateral orders," that could be appealed before a trial.

The reasoning behind Cohen and Abney was clear. Since the statute in question did not provide for interlocutory appeals, this Court held that such appeals would not be allowed except in situations where pretrial review was crucial. However, if Congress established a statutory basis for a

pretrial appeal, then, of course, that legislative scheme would control. In federal criminal cases, Congress authorized interlocutory appeals in some carefully drafted circumstances in 18 U.S.C.A. Sec. 3731.

Based upon these precedents, the respondent's assertion that this Court has found that it will not review pretrial orders entered in state cases is mistaken. The cases upon which the respondent relies, including DiBella v. United States, 369 U.S. 121 (1962), predate the amendments to 18 U.S.C.A. Sec. 3731. DiBella involved the issue of whether the government could appeal a pretrial order in a criminal case. This Court held that there was not a statutory basis for that appeal. However, 18 U.S.C.A. Sec. 3731 now supplies that basis. DiBella did not determine the

question of whether this Court would review, by a writ of certiorari, a case in which an appellate court, pursuant to an existing statute, rendered a final order in a pretrial appeal. In at least one federal case, this Court has done just that. United States v. Helstoski, 442 U.S. 477 (1979); See also United States v. Ceccolini, 435 U.S. 268 (1978).

Once the legislature grants to the government the right to seek pretrial review of certain court orders, the policy that this Court explained in Cohen and Abney no longer applies. At that point, the legislature or court in question has decided that the flow of the trial process may be interrupted because important pretrial decisions that may effect a trial's outcome must be reviewed. If they may be examined as a matter of right by a direct appeal, then

this Court, if it feels that it is appropriate, may review the appellate opinion by a writ of certiorari. Since the state's interlocutory appeal will probably be the only opportunity that the government has to raise the issue in question before the designated appellate court, to suggest that this Court cannot analyze the appellate court's ruling would be to forever insulate that holding from this Court's scrutiny. If, as in the case at bar, that decision affects federal constitutional principles, such a result would subvert this Court's position as the final arbiter of the United States Constitution.

In Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975), this Court discussed the reasoning that does apply to this case. Unlike Cohen and Abney, Cox listed the situations in which state litigation

is final for this Court's review. Also, unlike Cohen and Abney, Cox concerned the statute that governs the petitioner's request for relief in this case: 28 U.S.C.A. Sec. 1257.

In Cox, the majority held that this Court would only examine state court decisions that are "final." Justice White described the kinds of decisions that are final at 477:

> [T]he Court has recurringly encountered situations in which the highest court of a State has finally determined the federal issue present in a particular case, but in which there are further proceedings in the lower state court to come. There are now at least four categories of such cases in which the Court has treated the decision on the federal issue as a final judgment for the purposes of 28 U.S.C. Sec. 1257...and has taken jurisdiction without awaiting the completion of the additional proceedings anticipated in the lower state courts. [Emphasis supplied].

Justice White then described those four categories, two of which apply to the case at bar. He wrote at 479 and 481:

> In the first category are those cases in which there are further proceedings - even entire trials - yet to occur in the state courts but where for one reason or another the federal issue is conclusive or the outcome of further proceedings is pre-ordained....
>
> In the third category are those situations where the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the outcome of the case. Thus, in these cases, if the party seeking interim review ultimately prevails on the merits, the federal issue will be mooted; if he were to lose on the merits, however, the governing state law would not permit him again to present his federal claim for review. [Emphasis supplied].

The Colorado Supreme Court's decision is conclusive upon the federal issue presented by this case. Since that

order suppressed from use at trial the heroin taken from the respondent's pocket, which was the corpus delecti of the offense with which the respondent was charged, the result of any trial would be "preordained." Because the government could not establish the corpus delecti of the crime, the trial court would have to grant the respondent's motion for a judgment of acquittal.

If this case is returned to the trial court without this Court's review, the government will not later be able to obtain this Court's examination of the federal issue presented by the Colorado Supreme Court's opinion. As stated above, the prosecution cannot now present enough evidence to obtain a conviction. If the respondent is acquitted at trial, the government would be prevented from again appealing the issue presented by

this case. C.A.R. 4.1 (Appendix A); People v. Voss, 191 Colo. 338, 552 P.2d 1012 (1976). Even assuming, arguendo, that the prosecution could present enough evidence to a jury to convict the respondent, the government could not again appeal the question raised in this case. In fact, if the respondent were acquitted, this Court might find that any further appeal by the prosecution would be moot. In similar situations, this Court has held that it will review a state court's decision before all possible state proceedings have been held. California v. Stewart, 384 U.S. 436, 498 n. 71 (1966); South Dakota v. Neville, 74 L.Ed.2d 748, 755 n. 6 (1983); See also Fare v. Michael C., 439 U.S. 1310 (1978).

In Colorado, the prosecution may seek pretrial review of certain court

orders, involving constitutional issues, in order to resolve those questions before jeopardy attaches and the government can no longer try an accused. People v. Voss, supra; People v. Traubert, 199 Colo. 322, 608 P.2d 342 (1980). In the case at bar, C.A.R. 4.1, like 18 U.S.C.A. Sec. 3731, permits the state, as a matter of right, to obtain interlocutory review of some pretrial orders. As indicated in the Petition for a Writ of Certiorari at 1-2, the petitioner has taken every step in the Colorado courts to preserve this issue for this Court's review.

If this case is now remanded for trial, not only will the prosecution be unable to reappeal the issue presented here, but the respondent, as stated above, will be acquitted. Once he is acquitted, the double jeopardy doctrine

will prevent the state from retrying him, even if another appeal could be successfully brought before this Court. Therefore, the respondent's request that this Court dismiss the Writ is tantamount to a declaration that he has the right to be forever free from the charges brought against him before the petitioner may ask this Court to review the Colorado Supreme Court's decision. Not only is that position inconsistent with this Court's rulings, but it is inconsistent with justice. Therefore, this Court should deny the respondent's motion to dismiss the writ.

Respectfully submitted,

JAMES F. SMITH
District Attorney
Seventeenth Judicial District

By _____
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_____
Steven L. Bernard, #8897
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Appendix A

C.A.R. 4.1(a)

(a) GROUNDS. The state may file an interlocutory appeal in the Supreme Court from a ruling of a district court granting a motion under Crim.P. 41(e) and (g) and Crim.P. 41.1(e) made in advance of trial by the defendant for return of property and to suppress evidence or granting a motion to suppress an extra-judicial confession or admission; provided that the state certifies to the judge who granted such motion and to the Supreme Court that the appeal is not taken for purposes of delay and the evidence is a substantial part of the proof of the charge pending against the defendant.

Appendix B

C.R.Cr.P. 41(e)

(e) MOTION FOR RETURN OF PROPERTY AND TO SUPPRESS EVIDENCE. A person aggrieved by an unlawful search and seizure may move the district court for the county where the property was seized for the return of property and to suppress for use as evidence anything so obtained on the ground that:

(1) The property was illegally seized without warrant; or

(2) The warrant is insufficient on its face; or

(3) The property seized is not that described in the warrant; or

(4) There was not probable cause for believing the existence of the

grounds on which the warrant was issued; or

(5) The warrant was illegally executed.

The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the court where the trial is to be had. The motion shall be made and heard before trial unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court, in its discretion, may entertain the motion at the trial.

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No. 82-1845

In The
Supreme Court of the United States
October Term, 1983

THE STATE OF COLORADO,
Petitioner,

vs.

ANTONIO GUADALUPE NUNEZ,
Respondent.

PETITIONER'S BRIEF PURSUANT TO UNITED STATES SUPREME COURT RULE 34

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QUESTION PRESENTED FOR REVIEW

When both the defendant and the trial court concede during a hearing on a motion to suppress that the credibility of the affiant to a search warrant's affidavit is not at issue, is the trial court's order requiring the prosecution to reveal a confidential informant's identity beyond the scope of the Fourth Amendment?

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No. 82-1845

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ANTONIO GUADALUPE NUNEZ,

Respondent.

PETITIONER'S BRIEF PURSUANT TO UNITED STATES SUPREME COURT RULE 34

OPINION WHICH THE PETITIONER SEEKS TO REVIEW

The petitioner seeks review of the Colorado Supreme Court's decision in *People v. Nunez*, 658 P. 2d 879 (Colo. 1983). The text of that opinion is contained in the Joint Appendix at 134-139.

JURISDICTION

Pursuant to 28 U. S. C. A. Sec. 1257(3), the petitioner sought this Court's review by a Petition for a Writ of Certiorari. The Colorado Supreme Court entered its decision on February 22, 1983. The petitioner filed its petition on April 22, 1983. The petitioner's discussion of why this Court has jurisdiction to decide the issue raised by this case is contained in the Petition for a Writ of Certiorari at 1-9.

CONSTITUTIONAL PROVISION INVOLVED

This case involves the following portion of the Fourth Amendment to the United States Constitution:

> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated . . .

STATEMENT OF THE CASE

On November 7, 1981, pursuant to a warrant Denver Police officers and Adams County Sheriff's deputies searched the house located at 8690 Norwich Street, unincorporated Adams County, Colorado. During this search, these officers searched the person of the defendant, Antonio Nunez. The officers discovered fifteen balloons in Mr. Nunez' pockets, which contained a substance later analyzed to be heroin. Based upon this evidence, the prosecution charged Mr. Nunez with Possession of

a Schedule I Controlled Substance, contrary to C.R.S. 1973, § 12-22-309, as amended, and C.R.S. 1973, § 18-18-105 (2) (a), as amended. (Joint Appendix, hereinafter "J.A.," 10-13, 68-72).

Through counsel, the defendant filed a motion to suppress the heroin seized from him and a motion requesting that the court order the prosecution to disclose the name of a confidential informant upon whose statements the search warrant executed on November 7, 1981, was partially based. (J.A. 3-9, 13-20). On September 9, 1982, the Adams County District Court held a hearing on those motions. The affidavit for the warrant was introduced at the hearing. (J.A. 29). It contained information provided by three separate confidential informants. (J.A. 3-7). Defense counsel stated that he only sought the disclosure of one informant, alleging that only that person's credibility was in issue. (J.A. 28).

The affiant, Denver Police Sergeant Don DeNovellis, had written that the informant in question had told Sergeant DeNovellis that the informant had seen the defendant with a "large amount of heroin" within twenty-four hours of November 7, 1981. The informant said that the defendant had stated that he had just returned from Mexico, where he had purchased five ounces of heroin. The informant watched the defendant dilute the heroin and then package it in balloons. Sergeant DeNovellis wrote that the informant recognized heroin because he/she had previously used it. Sergeant DeNovellis also noted that the informant had previously provided him with reliable information that had led to seizures of heroin. (J.A. 3-7).

Defense counsel conceded that the credibility of the affiant, Sergeant DeNovellis, was not at issue. Near the beginning of the suppression hearing, defense counsel stated:

> We're not questioning the affiant's credibility, Sergeant DeNovellis' credibility . . . (J.A. 31).

Later in that hearing, he stated:

> My statement about Sergeant DeNovellis—I have no information at this point or presented to the court he intentionally made any misstatements. I think if we get the confidential informant disclosed and show he was in fact not at the Nunez residence on the 6th, that would go to the heart of the motion to suppress and, second of all, that there was recklessness on the part of the affiant not verifying the information or checking out the information. (J.A. 34).

Defense counsel argued that the informant's identity should be revealed so that he could subpoena the informant to testify at the suppression hearing. (J.A. 31). The trial court then said:

> I'm not concerned about Detective DeNovellis' credibility. I don't think that's in question at all. (J.A. 36).

The defendant testified in order to support his attorney's allegations. The defendant stated that on October 31, 1981, he had driven his motor home from his house on Norwich Street to the mountains in order to hunt. He said that he was accompanied by his father, his son, his nephew and a friend. The defendant stated that he had returned from his trip in the early morning hours of November 6, 1981. While he spent all of that day at the Norwich Street address, he insisted that no one visited his home except for his immediate family and at least

eight other relatives. He denied that he had traveled to Mexico between October 31 and November 6. (J.A. 43-46). On cross-examination the defendant admitted that he was awaiting trial in Denver on a charge of intimidating a witness. (J.A. 50-51). The defense did not present the testimony of any of the people who allegedly went hunting with the defendant or of anyone who had been in his home on November 6, 1981.

The prosecution argued that the court should not order the police to disclose the informant's identity. First, the prosecutor mentioned that the disclosure of the informant's identity could endanger that person's safety. (J.A. 40). Second, he pointed out that defense counsel was not questioning the affiant's credibility, but rather the credibility of the informant. Third, he observed that the prosecution would not use the informant as a witness at trial because the informant was not a witness to the incident upon which the charge was based. Fourth, he submitted that there was no disagreement between the informant's statements and the defendant's testimony. He concluded by stating that defense counsel had not established that disclosure of the informant's identity would be essential to the motion to suppress. (J.A. 73-75).

After hearing arguments of both counsel, the trial court found that disclosure of the informant's identity was necessary to resolve the motion to suppress and ordered the prosecution to reveal the informer's name. (J.A. 76-77). The prosecutor subsequently informed the court that he would not disclose the informant's identity because he was concerned for his/her safety. (J.A. 82-83). On October 7, 1982, the trial court, in a written opinion, found that disclosure of the informant was essential to

the resolution of the case. Because the prosecution refused to disclose the informant's identity, the trial court suppressed the evidence taken from the defendant in the search that occurred on November 7, 1981. (J.A. 91-93).

Pursuant to the Colorado Appellate Rules, the prosecution filed an Interlocutory Appeal in the Colorado Supreme Court. (J.A. 94-96). As in the trial court, the prosecution argued that, because the defendant had conceded that the affiant's credibility was not in issue, the trial court could not order the prosecution to disclose the informant's name for purposes of the suppression hearing. The government urged that the only issue at such a suppression hearing was whether the affiant lied or recklessly disregarded the truth. (J.A. 104-111, 131-134).

On February 22, 1983, the Colorado Supreme Court affirmed the trial court's decision. In doing so, that Court held:

> The People argue that the disclosure of confidential informants is limited to situations in which the veracity of the affiant-police officer is successfully attacked. This contention misapprehends the holding of *People v. Dailey*. *Dailey* recognized that errors in an affidavit for a search warrant can result "from the informant's perjury or reckless disregard for the truth, or from the negligence or good faith mistake of either the officer or the informant." (J.A. 138).

The State of Colorado then filed a Petition for a Writ of Certiorari in this Court. This Court granted that Writ on October 3, 1983.

SUMMARY OF THE ARGUMENT

The government has a qualified privilege to withhold the identity of a confidential informant. A court may override that privilege and order the prosecution to disclose the informant's identity if that information will be relevant to a case or necessary for its just resolution. An accused's request for disclosure usually arises in two situations. First, if an informant was a witness to the event upon which a criminal charge is later based, a court may order disclosure of that person's identity because he may be the source of potentially exculpatory evidence.

Second, a defendant may seek the identity of a confidential informant who provided the police with information that subsequently appeared in a search warrant. In this situation, if the accused establishes, by a preponderance of the evidence, that the *affiant* lied or recklessly disregarded the truth in relating what the informant said, then the court may strike the sections of the affidavit based upon the questionable statements and evaluate the remainder to see if it establishes probable cause. In order to make this determination, a court, after a proper demonstration by the accused that brings the *affiant's* credibility into issue, may order disclosure of the informant's identity so that he can be subpoenaed to testify.

There must be an attack upon the *affiant's* credibility before the informant can be disclosed. This requirement is based upon the purposes behind suppression hearings. Unlike the situation where an informant has witnessed a crime and may, therefore, know of relevant evidence, when an accused seeks to suppress evidence, he seeks to suppress the truth. The purpose of a suppression

motion is to remove probative evidence from the jury's deliberation as a sanction for police misconduct. If the police act appropriately, then suppression of the evidence is inappropriate. If an *informant* lies or recklessly disregards the truth, but the police then act carefully and responsibly, suppression is an improper remedy because it will not discourage police misfeasance. In this scenario, the wrongdoing, if any, comes from a private source: the informant. The Fourth Amendment's protections do not apply to such private sources.

In the case at bar, defense counsel readily conceded that the affiant's credibility was not at issue. That concession mooted his argument, because it established that there was no basis for ordering the prosecution to disclose the informant's identity or for suppressing the prosecution's evidence. Since there was no police misconduct in developing the search warrant, therefore, there was no reason for the trial court to impose any sanctions.

ARGUMENT

The Colorado Supreme Court's decision in this case incorrectly extends this Court's decisions that involve confidential informants beyond the scope of state action and permits an accused to obtain the identity of a confidential informant by presenting any evidence at all.

In 1914, this Court established the "exclusionary rule," a legal device designed to deter arbitrary police invasion of the privacy of American citizens. *Weeks v.*

United States, 232 U.S. 383 (1914). In *Weeks,* Justice Day described the scope of the exclusionary rule at 391:

> The effect of the Fourth Amendment is to put the courts of the United States and Federal officials, in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority, and to forever secure the people, their persons, houses, papers and effects against all unreasonable searches and seizures under the guise of law.

This position that the purpose of the exclusionary rule was to prevent government officials from capriciously interfering with established privacy interests was reaffirmed in *Mapp v. Ohio,* 367 U.S. 643 (1961) at 656:

> [T]he purpose of the exclusionary rule "is to deter —to compel respect for the constitutional guarantee in the only effectively available way—by removing the incentive to disregard it."

While it is clear that the exclusionary rule was forged to discourage unconstitutional searches and seizures, it is equally obvious that the exclusionary rule, and the Fourth Amendment from which it sprang, apply only to the conduct of police officers and government agents. It does not regulate the acts of a private person who wrongly invades another's home, nor does it require a court to exclude from trial evidence seized by a private person, even if that seizure would, if accomplished by a police officer, otherwise automatically result in the suppression of that evidence. In other words, because the Fourth Amendment was only written to control the excesses of government, it does not apply to the excesses of private citizens.

Beginning with *Burdeau v. McDowell,* 256 U.S. 465 (1921), this Court has firmly stated that the Fourth

Amendment does not apply to the actions of citizens themselves. This Court held at 475:

> The Fourth Amendment gives protection against unlawful searches and seizures, and . . . its protection applies to governmental action. Its origin and history clearly show that it was intended as a restraint upon the activities of sovereign authority, *and was not intended to be a limitation upon other than governmental agencies* . . .
>
> It is manifest that there was no invasion of the security provided by the Fourth Amendment against unreasonable search and seizure, as whatever wrong was done was the act of individuals in taking the property of another. [Emphasis supplied].

Although *Burdeau* was decided over sixty years ago, the principle that it announced is healthy. In *Coolidge v. New Hampshire,* 403 U.S. 443 (1971), this Court again applied that standard at 488:

> The exclusionary rules were fashioned "to prevent, not to repair," and their target is *official misconduct* . . . but it is no part of the policy underlying the Fourth and Fourteenth Amendments to discourage citizens from aiding to the utmost of their ability in the apprehension of criminals. If, then, the exclusionary rule is properly applicable . . . it must be upon the basis that some type of unconstitutional *police conduct* occurred. [Emphasis supplied; citations omitted].

Accord: United States v. Janis, 428 U.S. 433, 455 (1976); *Walter v. United States,* 447 U.S. 649, 656 (1980).

When a police officer incorporates statements from a confidential informant into a search warrant's affidavit, the resulting document combines the issues discussed above. On one hand, the search conducted by the police pursuant to the warrant is clearly "state action" that may

trigger the application of the exclusionary rule. However, on the other hand, if the confidential informant, and not the police, indulges in some misconduct, then the exclusionary rule cannot be applied to the fruits of the search because the source of the impropriety was not a government agent. When, as in the case at bar, an accused only argues, and a court only finds, that the alleged unconstitutional invasion of his privacy occurred because a confidential informant lied or recklessly disregarded the truth, then a court may not use the exclusionary rule to bar the prosecution from introducing at trial evidence seized in that search.

Confidential informants are a fact of a policeman's existence. They often provide the police with important information about crime. However, many informants speak to the police only if the officers promise them that their identities will be concealed. This bargain is mutually beneficial. The police receive tips that may be the only information available to solve a crime or apprehend a criminal. In exchange, the informant remains unnamed and unknown. In some situations, that anonymity may protect the informant's life.

In *Roviaro v. United States,* 353 U.S. 53 (1957), this Court recognized and approved of an "informer's privilege." Justice Burton described the rationale for that privilege at 59:

> The purpose of the privilege is the furtherance and the protection of the public interest in effective law enforcement. The privilege recognizes the obligation of citizens to communicate their knowlege of the commission of crimes to law enforcement officials, and by preserving their anonymity, encourages them to perform that obligation.

However, this Court recognized that this privilege is not absolute. If a trial court finds that disclosure of an informer's name would be helpful to an accused's defense, or if disclosure were necessary to the just resolution of a case, then that court could order the state to relinquish the informer's identity.

While, in the appropriate case, justice demands that an accused discover the name of his accuser, this Court has indicated that trial judges should not treat the "informer's privilege" lightly. In *Roviaro* at 61, footnote 9, this Court quoted, with approval, *Scher v. United States*, 305 U.S. 251 (1938):

> [P]ublic policy *forbids* disclosure of an informer's identity unless essential to the defense, as, for example, where this turns upon an *officer's good faith*. [Emphasis supplied].

Scher indicates that unless there is a proper demonstration by an accused that he needs to know who the informant was in order to prepare his case, a court *cannot* order the prosecution to reveal the informer's name.

A defendant's request to learn an informant's identity normally arises in two situations. First, an informant may have been a participant in or a witness to the event upon which a criminal charge has been based. In that factual framework, courts frequently order the state to tell the accused the informer's name because the informer may possess exculpatory evidence. The issue presented, therefore, is one of guilt or innocence. The case at bar does not involve this situation.

Second, an informant may have provided the police with information that, either alone or when combined

with other facts, establishes probable cause for the police to arrest someone or to search that person's house or possessions. Before 1983, if this information had been incorporated into an affidavit for a search warrant, it had to satisfy the two-pronged test that this Court established in *Aguilar v. Texas,* 378 U.S. 108 (1964) and *Spinelli v. United States,* 393 U.S. 410 (1969). The purpose of the *Aguilar-Spinelli* test was to require the police affiant to include enough reliable information in the affidavit to assure a reviewing magistrate that the police were not inventing "facts" so that they could obtain judicial approval to search a suspect's home and thereby unjustifiably invade his privacy.

In 1983, this Court altered the *Aguilar-Spinelli* standard in *Illinois v. Gates,* 76 L. Ed. 2d 527 (1983). Justice Rehnquist wrote that *Aguilar-Spinelli's* two-pronged test was too rigid. This Court held that a judge who reviews an affidavit that contained statements made by a confidential informant should examine the "totality of the circumstances" described in the affidavit in order to determine if it contained probable cause to believe that evidence of a crime was located in the place that the police wanted to search. Justice Rehnquist stated that the reviewing magistrate should use common sense when he decided whether to issue the warrant.

The *Aguilar-Spinelli* test did not resolve the question of whether an accused could discover the name of the informant who supplied information included in a search warrant's affidavit. In *McCray v. Illinois,* 386 U.S. 300 (1967), an accused sought the name of an informant who had provided a police officer with information that led to the accused's warrantless arrest. In upholding the trial

judge's decision to deny that request, this Court observed that when a defendant at a suppression hearing seeks the name of an informant who provided information to the police that led to the seizure of evidence from him, he seeks to avoid his guilt.

This Court recognized in *McCray* that the purpose of the suppression hearing that involves a confidential informant is to determine if the *police* have violated the Fourth Amendment. Justice Stewart, quoting New Jersey's Chief Justice Weintraub, underscored this position at 307-308:

> [T]he magistrate is concerned, ***not with whether the informant lied,*** but with whether the *affiant* is truthful in his recitation of what he was told. If the magistrate doubts the credibility of the *affiant,* he may require that the *informant* be identified or even produced. [Emphasis supplied].

In *Franks v. Delaware,* 438 U.S. 154 (1978), this Court held that an accused, at a motion to suppress, could attack the veracity of the affiant to a search warrant's affidavit. Justice Blackmun wrote that the purpose of this "veracity attack" was to prevent the police from misleading a reviewing magistrate and to protect the Fourth Amendment rights of citizens. When combined with *Aguilar-Spinelli* or *Gates, Franks* provides an opportunity for both courts and defendants to assure themselves that police affiants have told the truth in their affidavits.

When an accused seeks to attack a warrant in this situation, the only reason upon which a court can rely when it orders the prosecution to disclose an informant's identity is that the accused has made an adequate factual

demonstration that the police-affiant lied or recklessly disregarded the truth. Without that showing, this Court's decisions have established that a judge cannot order the state to reveal an informer's name.

While *Franks* at 170 left open the issue of whether an informant's identity should be disclosed *after* an accused has made a proper demonstration that there were falsehoods in an affidavit, this Court clearly set out what the fundamental elements of that demonstration must be. Justice Blackmun described those components at 171:

> There is, of course, a presumption of validity with respect to the affidavit supporting the search warrant. To mandate an evidentiary hearing, the challenger's attack must be more than conclusory and must be supported by more than a mere desire to cross-examine. There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof. . . . Allegations of negligence or innocent mistake are insufficient. The deliberate falsity or reckless disregard whose impeachment is permitted today is *only of the affiant, not of any nongovernmental informant.* [Emphasis supplied].

This Court's position that a veracity attack only involves a police-affiant's, not an informant's, credibility, has been echoed in state and federal courts in cases that have been decided both before and after *Franks*. *In re Search Warrant Dated July 4, 1977,* 667 F. 2d 117 (C.A. D.C. 1981), *cert. den.* 456 U.S. 926 (1982); *United States v. Southard,* 700 F. 2d 1 (C.A. 1 1983); *United States v. Edwards,* 602 F. 2d 458 (C.A. 1 1979); *United States v. Barnes,* 604 F. 2d 121 (C.A. 2 1979), *cert. den.* 446 U.S. 907 (1980); *United States v. Arrington,* 618 F. 2d 119 (C.A. 5 1980), *cert. den.* 449 U.S. 1086 (1981); *United*

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The analysis of these cases was perhaps best summarized in *United States v. Dorfmann, supra,* at 366:

> The fact that a third party lied to the affiant, who in turn included the lies in a warrant affidavit, does not constitute a *Franks* violation. A *Franks* violation occurs *only* if the affiant knew the third party was lying, or if the affiant proceeded in reckless disregard of the truth. Therefore, *allegations that hearsay contained in a warrant application is false, or that an informant whose story was recited by an affiant who was lying, are insufficient to require a Franks hearing,* since the falsity or recklessness alleged is not that of the affiant, but of a third party. [Emphasis supplied].

Aside from Colorado, research has not revealed *any* jurisdiction that permits an accused to attack only an informant's credibility at a veracity hearing and then ask a

trial court to order the prosecution to disclose the informant's identity.

There are at least two reasons why this Court in *McCray* and *Franks* limited the situations in which an accused could successfully request and obtain an informer's name. First, if a veracity attack is not limited to the affiant, an accused will frequently present unverifiable evidence that the informant has lied. As this Court recognized in *McCray*, at 306:

> If a defendant may insist upon disclosure of the informant in order to test the truth of the officer's statement that there is an informant or as to what the informant related or as to the informant's reliability, we can be sure that every defendant will demand disclosure. He has nothing to lose and the prize may be the suppression of damaging evidence if the state cannot afford to reveal its source, as is so often the case. And since there is no way to test the good faith of a defendant who presses the demand, we must assume the routine demand would have to be routinely granted.

The case at bar presents exactly the scene that this Court feared and predicted in *McCray*. Armed with an affidavit that complied with both the *Aguilar-Spinelli* test and the newer *Gates* standard, the police searched the defendant's home and person and took from him fifteen balloons that contained heroin. Clearly, the informant had not only been proved reliable in the affidavit, but the subsequent search by the police further corroborated the informant's reliability when they discovered heroin, contained in balloons, on the defendant's person. Yet, at the motion to suppress, the defendant said that the informant could not have seen what the informant stated that he or she saw. The defendant then testified that he

did not know what heroin was, although the police had taken a large amount of it from his own pocket.

The danger of not limiting a veracity challenge to the affiant's credibility is clear. If an accused can attack an informant's statements, then only the human imagination can limit the testimony about the informant that the accused could present. Because, unlike an officer-affiant, an informer is not available for consultation or testimony during a suppression hearing, it would be difficult, if not impossible, to refute even the most bizarre defense allegations.

The second reason for limiting disclosure is, as stated above, that the exclusionary rule only applies to action taken by government agents. If there is no allegation of official misconduct, then the Fourth Amendment's sanctions cannot be triggered. As the long list of cases cited above indicates, even if an informant intentionally lies, a trial court reviewing an affidavit should not, and cannot, taken any action against the state unless the police-affiant knowingly or recklessly participated in that lie. In order to convince a court to order the prosecution to disclose the informant's name, a defendant must establish some police misconduct that can only be properly investigated by questioning the informant.

Doubtless, the defendant will argue that the informant's identity should be revealed so that defense counsel can question him to determine if the affiant lied or recklessly disregarded the truth. However, this argument places the cart before the horse. Instead of first establishing that there is an adequate basis to believe that the affiant lied or recklessly disregarded the truth, the de-

fendant would ask a trial court to reveal the informer's name so that the defendant can *then* determine if there has been police misconduct. This proposed procedure is far removed from the substantial preliminary showing that this Court required in *Franks*.

In this case, the Colorado Supreme Court's decision extended the reach of the Fourth Amendment into a private area that this Court has repeatedly found to be outside of the scope of the exclusionary rule. In its opinion, the Colorado Supreme Court held:

> The People argue that the disclosure of confidential informants is limited to situations in which the veracity of the affiant-police officer is successfully attacked. This contention misapprehends the holding of *People v. Dailey*. *Dailey* recognized that errors in an affidavit for a search warrant can result "from the *informant's* perjury or reckless disregard for the truth, or from the negligence or good faith mistake of either the officer or the *informant*." . . . When, following a veracity hearing, the probability of one of those kinds of error has been found, the election of remedies of sanctions is left to the discretion of the district court. The necessary foundation for the court's exercise of discretion in ordering disclosure is a showing of a reasonable basis in fact to question the accuracy of the informant's recitals. [Emphasis supplied; citation omitted]. (J.A. 138).

This decision is clearly contrary to *McCray*, *Franks* and the list of decisions cited above.

The purpose of *Roviaro*, *McCray* and *Franks* was to protect an accused from police misconduct while preserving for the police an important source of information. The process that those cases established was not crafted to act as a discovery tool, nor was it meant to permit de-

fendants to obtain the name of every informant that the police have ever used. Those cases recognize that the purpose of a "veracity hearing" was only to test the honesty of police-affiants. The holding in this case not only "polices the police," but it tries to make the Fourth Amendment an instrument to control a private citizen's behavior. Obviously, the Fourth Amendment does not, and cannot, go that far.

McCray made it clear that an accused files a motion to suppress items that were seized in a search conducted pursuant to a warrant in order to avoid his guilt. Using that warrant, the police have taken items that may be damning evidence that will be introduced at the accused's trial. The most popular shield that a defendant can raise to avoid the thrust of that evidence is the exclusionary rule. Since the *only* purpose of the exclusionary rule is to deter official misconduct, the Colorado Supreme Court erred when it held that the exclusionary rule could be applied to sanction non-governmental behavior.

The ruling in this case will destroy the "informer's privilege" in Colorado. If an accused can present any evidence, no matter how wild or far-fetched, that an *informant* lied, the scenario that this Court feared in *McCray* will occur in almost every case in which the police have used an informant in a search warrant. The accused will demand disclosure and present some testimony to support his demand. Because the trial court will not be able to assess the defendant's good faith, that court will order the state to reveal the informer's name. If the government wishes to protect the informer's anonymity, the state will refuse to comply with this request. The court will then suppress from use at trial the evidence

seized from the accused. The accused has won, the government has lost and no Fourth Amendment principle has been furthered. In this case, the exclusionary rule has run amok.

It is indisputable that the police did not intentionally or recklessly impinge upon the defendant's constitutional rights in the case at bar. They acted in good faith. If the purpose of the exclusionary rule is to deter official misconduct, it should not have been applied to the instant case because the police did not engage in action that should be deterred. In his concurring opinion in *Gates, supra,* Justice White addressed this dilemma at 562:

> [I]t is apparent as a matter of logic that there is little if any deterrence when the rule is invoked to suppress evidence obtained by a police officer acting in the reasonable belief that his conduct did not violate the Fourth Amendment.

In the instant case, the search warrant's affidavit complied with the *Aguilar-Spinelli* test and the *Gates* standard. By satisfying those conditions, the affidavit provided the reviewing magistrate with probable cause to believe that the defendant possessed heroin. At the suppression hearing the defendant did not satisfy *Franks* or *McCray* because he conceded that the affiant's credibility was not at issue. However, even though the state followed each of the rules that this Court has established to govern cases that involve confidential informants, the Colorado Supreme Court held that the informant's name must nonetheless be revealed. If that disclosure can be obtained on flimsy evidence designed only to impeach a private person, then this Court's carefully crafted rules have been rendered meaningless and the "informer's privilege" has died.

CONCLUSION

In its decision in this case, the Colorado Supreme Court has effectively emasculated the "informer's privilege." While an accused's Fourth Amendment rights should be protected, this Court's decisions in *Aguilar, Spinelli, Gates, Roviaro, McCray* and *Franks* have established a process with which the State must comply in order to obtain a search warrant. That process not only protects an accused's privacy by assuring that the police must supply a magistrate with adequate, reliable information before a search warrant is issued, but it also permits an accused to attack that warrant, after it has been executed, by demonstrating that the government's agents lied or recklessly disregarded the truth. The opinion in this case subverts that process, and the strong public interest behind the "informer's privilege," by permitting an accused, who supplies any evidence at all, to obtain the name of an informant even when the actions of the State's representatives have not been questioned. In order to stop the erosion of the "informer's privilege" that will harshly and irrevocably cripple fair and effective law enforcement, this Court should reverse the decision of the Colorado Supreme Court.

Respectfully submitted,

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In The
Supreme Court of the United States
October Term, 1983

THE STATE OF COLORADO,
Petitioner,

vs.

ANTONIO GUADALUPE NUNEZ,
Respondent.

On Writ of Certiorari to the Supreme Court of Colorado

BRIEF OF RESPONDENT

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QUESTION PRESENTED FOR REVIEW

May Colorado interpret its own state law to require disclosure of a confidential informant in order to conduct a veracity challenge based upon an initial showing that the informant will provide information essential to the merits of his suppression ruling?

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No. 82-1845

In The
Supreme Court of the United States
October Term, 1983

THE STATE OF COLORADO,

Petitioner,

vs.

ANTONIO GUADALUPE NUNEZ,

Respondent.

On Writ of Certiorari to the Supreme Court of Colorado

BRIEF OF RESPONDENT

JURISDICTION

The petitioner seeks jurisdiction pursuant to 28 U.S.C. § 1257(3). The respondent contests jurisdiction on the grounds that the decision being appealed is not a final decision of the courts of Colorado[1] and that the decision

[1]See respondent's Motion to Dismiss for Want of Jurisdiction.

of the Colorado Supreme Court is based upon independent and adequate state grounds.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves portions of the Fourth, Fifth, and Fourteenth Amendments to the United States Constitution:

a. The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated . . . Fourth Amendment to the United States Constitution.

b. No person shall . . . be deprived of life, liberty, or property, without due process of law; . . . Fifth Amendment to the United States Constitution.

c. No state shall . . . deprive any person of life, liberty or property, without due process of law; . . . Fourteenth Amendment to the United States Constitution.

STATEMENT OF THE CASE

On November 7, 1981, pursuant to a search warrant, officers of the Denver Police Department and the Adams County Sheriff's Department searched the house, vehicles, and person of the respondent, Antonio Nunez. During the search, the officers allegedly discovered fifteen balloons of heroin in the respondent's pocket. On February 25, 1982, the defendant filed the following motions: Motion to Suppress, Motion to Disclose Informant, Motion for Disclosure of Deals and/or Compensation. (JA. 13-60).

On September 9, 1982, a motions hearing was held at which time the trial court judge granted the defendant's Motion to Disclose Informant. No other motions were ruled upon by the trial court judge. (J.A. 20-81). The defendant's Motion to Suppress Evidence was *never* decided by the trial court judge, (J.A. 25-77) nor did counsel for the defendant indicate that, for the purposes of a suppression motion, he was not challenging the credibility of the affiant. (J.A. 31-42).[2]

Subsequent to the motions hearing and after the District Attorney indicated the confidential informant would not be disclosed, the defendant filed a Motion to Dismiss, or, in the Alternative, Motion to Suppress. (J.A. 19). This motion was granted by the Trial Court Judge in a written Findings of Fact, Conclusions of Law and Order dated October 7, 1982. (J.A. 91-92).

On October 18, 1982, a notice of interlocutory appeal was filed by the petitioner. (J.A. 34-35).

On February 22, 1983, the Supreme Court of the State of Colorado issued its decision in the instant case affirming the Trial Court's Order requiring disclosure of the confidential informant. (J.A. 135-139).

The State of Colorado subsequently filed a Petition for a Writ of Certiorari in this Court which was granted on October 3, 1983. Subsequent thereto, the respondent filed a Motion to Dismiss for Want of Jurisdiction which was denied by this Court on November 28, 1983.

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[2]A thorough discussion of these events, is contained in Argument, Section E.

SUMMARY OF ARGUMENT

Given the factual background of the instant case, it is unclear from reading the petitioner's Writ of Certiorari and Opening Brief exactly what issues are before this Court. In both their Writ and Opening Brief, the petitioners attempt to inject issues into this litigation which were never raised before or addressed by the Colorado Supreme Court. In Argument Section E, it is demonstrated conclusively that the only issue ever ruled upon by the District Court Judge and adjudicated before the Colorado Supreme Court was the respondent's request for disclosure of a confidential informant for the purpose of conducting a subsequent suppression hearing. Notwithstanding this fact, the arguments contained in the petitioner's brief appear to encompass three possible separate issues. In this section the respondent enumerates these three issues, argues that only one is properly before this Court, and summarizes the merits of each issue. The three issues suggested by the petitioner are:

1. Whether the State of Colorado enunciated a new rule regarding the proper standard to be met in successfully pursuing a veracity challenge, *on the merits.*

2. Whether the Colorado Rule regarding the type of threshold showing required before a criminal defendant is entitled to a hearing on his veracity challenge is inconsistent with the decision in *Franks v. Delaware,* 438 U. S. 154 (1978). If so, is this standard based on an independent and adequate state ground.

3. Whether the Colorado rule regarding the disclosure of confidential informants for the purpose of conducting a veracity challenge violates the United States Con-

stitution or whether the rule is based upon the Colorado Supreme Court's interpretation of Colorado common law, and therefore relies on an independent state ground.

In addition to the issues directly or indirectly raised by the petitioners, the respondent poses the following question: should the Petition for Certiorari previously granted be dismissed as being improvidently granted in that the Supreme Court's decision on the disclosure issue was based upon an independent and adequate state ground.

The respondent maintains that the instant case presents only two issues to this Court: Whether the Writ should be dismissed as being improvidently granted and whether Colorado's rule regarding the disclosure of confidential informants is violative of the United States Constitution.

With respect to the standards which govern whether a defendant has been successful in his veracity challenge, *on the merits,* the Colorado law is absolutely identical to, and therefore consistent with, the rules of law established in *Franks v. Delaware,* 438 U. S. 154 (1978). In Colorado, a criminal defendant has the burden of proving, by a preponderance of the evidence, that an affidavit filed in support of a search warrant contains errors which resulted from the perjury or reckless disregard for the truth on the part of the *affiant-officer.* If a criminal defendant meets this burden, the erroneous information is stricken from the affidavit and the affidavit is reviewed to determine if it still establishes probable cause. The defendant will ultimately succeed only if the purged affidavit does not establish probable cause. Given the fact that the Colorado Rule is identical to the rule established by *Franks,*

there is no reason for this Court to address this issue. Furthermore, in reaching its decision in *People v. Nunez,* 658 P. 2d 849 (Colo. 1983), the Colorado Supreme Court did not have occasion, nor did it have reason, to pass upon this issue since the only issue raised before it was disclosure of confidential informants.

Similarly, the issue regarding what type of threshold showing must be made by a defendant to entitle him to a veracity hearing was never raised before the Colorado Supreme Court; and therefore, it also is not properly before this Court. However, should this Court take cognizance of this issue the respondent acknowledges that the Colorado Rule regarding threshold showings differs from the rule announced in *Franks.* While *Franks* required a substantial preliminary showing of intentional or reckless falsity on the part of the affiant-officer, the Colorado Supreme Court has deemed it appropriate to accord a defendant a veracity hearing if he shows a good faith basis in fact to question the accuracy of the affidavit for a search warrant. *People v. Dailey,* 639 P. 2d 1068, 1074-1075 (Colo. 1982). In reaching its holding on this issue, the Colorado Supreme Court based its decision on the Colorado Constitution as well as its determination that the *Franks* case does not prohibit a veracity hearing based upon a lesser threshold showing. Therefore, the Colorado Rule regarding threshold showings is based upon an independent state ground, that is, an interpretation of its own constitution. Case law indicates that a state, in interpreting its own constitution and in assessing and managing its own resources may expand upon the due process rights provided to a criminal defendant. Finally, the approach taken by Colorado regarding threshold showings is consistent with

the approach taken by other states and is not unreasonable.

The only motion ever adjudicated in the District Court, the only issue raised to and addressed by the Colorado Supreme Court, and therefore the only issue before this Court is the issue regarding disclosure of informants. The so-called "informer privilege" is a privilege, enjoyed by the government, not to disclose the identity of a confidential informer who provides information to law enforcement agents. The disclosure of confidential informants is a discovery issue which requires the balancing of a defendant's right to discover relevant information versus the government's privilege of nondisclosure. The informer privilege is strictly a creature of common law and each state, in developing and interpreting its own common law, may weigh the competing interests involved to determine the scope and weight of the privilege. Furthermore, neither the *Nunez* decision, nor any of the cases upon which it is based, interpret or infringe upon rights guaranteed by the United States Constitution and any interference by this Court with the *Nunez* determination "would be a wholly unjustifiable encroachment . . . upon the constitutional power of States to promulgate their own rules of evidence . . . in their own State courts . . . *Spencer v. State of Texas,* 385 U. S. 554, 568-569". *McCray v. State of Illinois,* 386 U. S. 300, 313 (1967).

Therefore, the Petition for a Writ of Certiorari, previously granted, should be dismissed as being improvidently granted.

ARGUMENT[3]

A. The Supreme Court of Colorado decided the Nunez case on independent and adequate state grounds; therefore, certiorari in the instant case was improvidently granted.

In deciding the *Nunez* case, the Colorado Supreme Court neither announced nor extended existing precedent. Rather the Colorado Supreme Court merely applied precedents established in other cases[4] to the facts presented in *Nunez*. In short, the *Nunez* decision plays an insignificant role in the evolution of the legal issues which are currently before this Court.

In reaching its decision in *Bueno* and *Dailey*, and in applying the precedents contained therein to the instant case, the Colorado Supreme Court interpreted the common law informer privilege, which is evidentiary in nature, and balanced that privilege against a criminal defendant's right to discover relevant evidence. *See, e. g., United States v. Tolliver*, 569 F. 2d 724 (2nd Cir. 1978)[5]. Unless the result of this balancing test infringes upon rights

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[3]It is the respondent's position that the only issues before this Court are whether the writ should be dismissed as being improvidently granted and whether disclosure of the confidential informant was proper. *See* Summary of Argument. The respondent will discuss the other issues in the event this Court should decide to review them.

[4]*People v. Dailey*, 639 P. 2d 1068 (Colo. 1982); *People v. Bueno*, 646 P. 2d 931 (Colo. 1982); and, *People v. Martinez*, 685 P. 2d 260 (Colo. 1983).

[5]The American Bar Association Project on Standards for Criminal Justice, in its publication *Standards Relating to Discovery and Procedure before Trial* (1970 Supp.) § 2.6 treats the informer privilege as a discovery matter.

guaranteed to criminal defendants by the Federal Constitution, the resolution of this issue is purely a state matter which, under principles of federalism, is exclusively reserved to the discretion of state courts in interpreting their own constitutions and common law. *McCray, supra,* at 313.

The informer privilege is a matter of common law which has been developed through centuries of court decisions.[6] In his law review article, *McCray v. Illinois: Probable Cause and the Informer Privilege,* 45 Den. L.J. 399, (1968), Joseph Quinn, a Justice on the Colorado Supreme Court who authored the opinion in *People v. Bueno, supra,* explained the common law roots of the informer privilege: "Most privileges, including the informer privilege, are generally creatures of statute or judicial rule and have been strictly construed because they are in derogation of the common law policy to uphold disclosure of all relevant facts in the interest of truth." *Id.* at 414. Being a creature of common law, therefore, the privilege does not have a constitutional dimension nor does it call into play any rights guaranteed by the Federal Constitution. *Id.* at 414-417.

This court has forcefully underscored the common law roots of the informer privilege and the exclusive power of states to regulate it. *McCray v. Illinois, supra,* at 313; *Spencer v. State of Texas, supra,* at 568-569. In *McCray,* the petitioners asserted an absolute right to disclosure of confidential informants in a suppression hearing. In rejecting this contention, this court strongly

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[6]See 76 A. L. R. 2d 262; Grano, *A Dilemma for Defense Counsel; Spinelli-Harris Search Warrants and the Possibility of Police Perjury,* 1971 U. Ill. L.F. 405, 428-440 (1971).

stated that disclosure of informants is an evidentiary matter to be interpreted by the individual states based upon state law. *McCray, supra,* at 308.

Although this Court has supervisory responsibility to determine the scope and weight to be accorded the informers privilege when deciding *federal* criminal cases[7], it should not, according to well-settled principles of federalism, interfere with the decision of a state high court interpreting the application of the privilege within its own state court system, *Id.* at 311-313. In fact, this court has specifically recognized that it has neither authority nor jurisdiction to so interfere. "To take such a step would be quite beyond the pale of this Court's proper function in our federal system. It would be a wholly unjustifiable encroachment by this Court upon the constitutional power of states to promulgate their own rules of evidence . . . in their own state courts . . . *Spencer v. State of Texas, supra,* at 568-569", *McCray, supra,* at 313.

The impact of *McCray* upon a state's ability to regulate the informer privilege was described as follows by Justice Quinn:

> The net effect of the Court's rejection of McCray's constitutional claims and the relegation of *Roviaro* to an evidentiary status is to leave the states a freer hand in formulating their own rules of informer privilege. In fact, the Court in *McCray* hinged its decision on Illinois' evidentiary rule as outlined in judicial decisions, which precluded disclosure of the informer's identity where 'the trial judge is convinced by evidence submitted in open court and subject to cross-examination, that the of-

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[7]See e. g., Fed. R. Crim. P. 26; Fed. R. Evid. 501, Fed. Rules of Evid.

> ficers did rely in good faith upon credible information supplied by a reliable informant'.

J. Quinn, *McCray v. Illinois: Probable Cause and the Informer Privilege, supra,* at 416. (footnote omitted).

A review of the Colorado cases, including *Nunez,* which have interpreted and applied the informer privilege demonstrates that these decisions rest on an interpretation of Colorado law and not the Federal Constitution. Therefore, the decision in *Nunez,* which affirms the trial judge's ruling regarding disclosure of a confidential informant, rests exclusively on state grounds and therefore the instant petition should be dismissed as being improvidently granted.

For over one hundred years, this Court has adhered to the principle that it will not review a decision by a state court that is based upon independent and adequate state grounds. This doctrine was first enunciated in the case of *Murdock v. City of Memphis,* 87 U. S. (20 Wall.) 590 (1874). In *Murdock,* this Court determined that even if a federal question was contained in a particular case, review would not be granted if the case was exclusively decided on adequate state grounds.

In *Herb v. Pitcairn,* 324 U. S. 117, 125-126 (1945), this Court expanded upon the operation of this principle:

> This court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds. [citations omitted]. The reason is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and federal judicial systems and in the limitations of our own constitution. Our only power over state judgments is to correct

> them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion and if the same judgment will be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than advisory opinion.

Id. at 125-126.

Even if a particular decision of a state court rests upon two grounds, one which is Federal and the other which is non-federal, this Court will not take jurisdiction of a case "if the non-federal ground is independent of the federal ground and adequate to support the judgment" *Fox Film Corporation v. Muller*, 296 U. S. 207, 210 (1935). Recent decisions indicate the continuing vitality of the "independent and adequate state ground" doctrine. *City of Revere v. Massachusetts General Hospital*, — U. S. —, 103 S. Ct. 2979 (1983); *Florida v. Casal*, — U. S. —, 103 S. Ct. 3100 (1983) (per curiam). Furthermore, the independent state law basis for a decision often does not become apparent until briefs have been filed and arguments presented. *Wolf v. Weinstein*, 372 U. S. 633 (1963).

Based on the common law basis of the informer privilege, as well as the decision in *Nunez*, itself, the decision of the Colorado Supreme Court to affirm the district court judge's disclosure order was based upon its interpretation of Colorado law and did not seek to interpret any federal law or right. It follows that the decision of the Colorado Supreme Court in *Nunez* is based upon an independent and adequate state ground and, therefore, the instant case should be dismissed.

B. The Colorado Rules governing the merits of a veracity challenge are identical to those announced in Franks v. Delaware.

In *Franks* this Court resolved the issue of whether a defendant in a criminal proceeding has a right, under the fourth and fourteenth amendments, to challenge the truthfulness of factual statements contained in an affidavit executed in support of a search warrant. This Court first determined that a defendant is entitled to a veracity challenge upon a "substantial preliminary showing" that the affidavit contained false information.[8] This Court then held that, at the veracity hearing itself, the defendant has the burden of proving, by a preponderance of the evidence, that the *affiant-officer* knowingly and intelligently made a false statement or made a statement with reckless disregard for the truth. If, after the false material is deleted, the affidavit is insufficient to establish probable cause, the search warrant will be voided and any fruits obtained in execution thereof, will be suppressed. *Franks, supra,* at 156-157.

In *Nunez,* the Colorado Supreme Court did not announce a new rule regarding what must be proven at a veracity hearing. In fact, this issue has never been raised at any level of the instant litigation, nor could it have been since the trial court never rendered a decision on the veracity challenge contained in the defendant's Motion to Suppress. Therefore, this issue is not properly before this Court. Notwithstanding this fact, the petitioners now attempt to raise this issue by inferring that the

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[8]This holding, as it compares to the Colorado Rule, is discussed in Argument, Section C.

Colorado Rule regarding what must be proven at a veracity hearing is inconsistent with *Franks*. This assertion lacks merit because the Colorado Rule is identical to the requirements set forth in *Franks*.

The seminal Colorado case in this area is *People v. Dailey, supra*. In *Dailey*, the Colorado Supreme Court reviewed a suppression order entered by a district court judge in the City and County of Denver. The judge below had determined that "all false information in an affidavit for a search warrant must be stricken without regard to the source of the error, before determining its sufficiency to establish probable cause". *Dailey* at 1075. In other words, the *trial court* had not made a distinction between false statements made by the informant as opposed to those made by the affiant-officer. In reversing the trial court's order, the Supreme Court of Colorado stated: "If the source of the error is intentional falsehood or reckless disregard for the truth on the part of the *affiant-officer*, the statements must be stricken from the affidavit and if the remaining statements are insufficient to establish probable cause, the Motion to Suppress must be granted." *Id.* at 1075. (Emphasis added).

In the *Dailey* decision, the Colorado Supreme Court did mention the other possible sources of error in an affidavit and the legal implications that would flow therefrom:

> The errors, however, could have resulted from the informant's perjury or reckless disregard for the truth, or from the negligence or good faith mistake of either the officer or the informant. Other sources of error can be imagined. We consider it inadvisable to attempt to develop the consequences which would follow under the United States and Colorado Con-

> stitutions from each of the various possibilities as to the origin of the error.

Id. at 1075.

The issues left open by the Colorado Supreme Court in *Dailey,* the effect of errors based upon the informant's perjury or the negligence or good faith mistake of either the officer or the informant, have not been addressed by the Colorado Supreme Court in any subsequent case.

In its presentation to the Colorado Supreme Court in *Nunez* the petitioner confused the standards set forth in *Dailey* for disclosure of a confidential informant with those necessary to prevail on a veracity challenge. While it is true, under *Dailey* and *Bueno,* that a defendant need not prove perjury or reckless disregard for the truth on the part of the affiant-officer *before obtaining disclosure of a confidential informant* for the purpose of conducting a suppression hearing, the Colorado Supreme Court has never stated that a defendant can be successful *in a veracity challenge* by proving anything less.

In clarifying this point, the Colorado Supreme Court stated: "The people argue that the disclosure of confidential informants is limited to situations in which the veracity of the affiant-police officer is successfully attacked. This contention misapplies the holding of *People v. Dailey*". (J.A. 138). The Supreme Court then proceeded to describe the different possible sources for error in an affidavit. (J.A. 138). After delineating those possibilities, and after applying *Bueno* and *People v. Martinez,* 658 P. 2d 260 (Colo. 1983), the Court announced the actual holding in the *Nunez* case that "the necessary foundation for the court's exercise of discretion in ordering disclosure is a showing of a reasonable basis in fact

to question the accuracy of the informant's recitals." (J.A. 138).

In conclusion, the proper standard to be employed in adjudicating a veracity challenge was never raised before the Colorado Supreme Court in the *Nunez* case. Nevertheless, the Colorado rule, as set forth in *Dailey*, is identical to the rule announced in *Franks* and is therefore consistent with this Court's interpretation of the fourth amendment in this area.

C. The Colorado Rule regarding the threshold showing necessary to hold a veracity hearing, which was neither raised before nor decided by the Colorado Supreme Court, is based upon Colorado's interpretation of its own Constitution, is not inconsistent with Federal Law, and reasonably balances the interests involved.

1. The Colorado Rule regarding threshold showings is not inconsistent with federal law and reasonably balances the interests involved.

In *Franks*, this Court discussed the circumstances under which a veracity hearing *must* be accorded a criminal defendant. *Franks, supra* at 168. After weighing the competing interests involved, this court decided that the Fourth Amendment requires that a veracity hearing be held if a defendant "makes a substantial preliminary showing that a false statement knowing and intentionally, or with reckless disregard for the truth was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to finding of probable cause the Fourth Amendment requires that a hearing be held at the defendant's request." *Franks,* 438 U.S. at 156-157.

In *Dailey*, the Colorado Supreme Court addressed the identical issue and determined that a criminal defendant is entitled to a veracity hearing if he can demonstrate a "good faith basis in fact to question the accuracy of an affidavit for search warrant . . ." *Dailey, supra*, at 1075.

This determination by the Colorado Supreme Court was based on two grounds: Its interpretation of *Franks and* the Colorado Constitution. In the first instance, the Colorado Supreme Court determined that *Franks* does not *prohibit* a state from granting a veracity hearing upon a lesser showing. Additionally, the Colorado High Court acknowledged the obvious fact that this Court in *Franks* did not "treat the question whether our state constitution requires such a hearing on some lesser showing of probable merit. *See Colo. Const.* Art. II, § 7". *Id.* at 1074. In a footnote to the last quote, the Supreme Court of Colorado states: "In our previous cases we have not explicitly considered the extent to which the federal and state constitutions mandate a hearing to resolve veracity challenges to a warrant affidavit." *Id.* at 1074.

The Colorado Supreme Court's reading of *Franks,* that it does not preclude a hearing upon a lesser threshold showing, is reasonable in light of the concerns which motivated the creation of a threshold standard in the first place. Prior to *Franks*, the state of Delaware had an absolute bar to veracity challenges. Delaware vigorously argued against any interpretation of the fourth amendment which would mandate veracity hearings and thereby strain its judicial and law enforcement resources. In considering these legitimate state concerns, Justice Blackmun's majority opinion set only *minimum* threshold re-

quirements necessary to trigger a hearing on the veracity of an affidavit supporting a search warrant. Justice Blackmun stated: "The rule announced today has a limited scope, both in regard to when exclusion of the seized evidence is mandated, and when a hearing on allegations of misstatements *must* be accorded." *Franks, supra,* at 168 (emphasis added).

By so limiting the threshold requirements for a veracity hearing, *Franks* allowed the states to maintain a substantial degree of control over their own court dockets, the weight and respect to be given to the warrant-issuing process, and the burden to be placed on their law enforcement agencies. Also, in deference to their right to frame suitable procedural rules, this Court allowed individual states to determine the appropriate proffer of evidence to be submitted in support of a defendant's request for a veracity hearing. By extending the holding in *Franks* to allow for veracity challenges upon a showing of "some good faith basis in fact to question the accuracy of an affidavit", *Dailey, supra,* at 1074-75, the Supreme Court of Colorado made its own independent determination concerning the proper balance between the rights to be granted to a criminal defendant versus the allocation of its state's judicial and law enforcement resources. In short, the Colorado Supreme Court's determination that a lesser threshold showing is appropriate does not conflict with the concerns expressed in, and the rationale behind, the *Franks* decision. Furthermore, there are strong reasons for more flexible standards regarding threshold showings.

Many commentators have pointed out that, in reality, the warrant—issuing process is often a prefunctory pro-

cedure.[9] Although some states have provisions for presenting a confidential informant to a magistrate or for a hearing prior to the issuance of a search warrant, Colorado law does not provide for either of these alternatives. *See* Colo. Crim. P. 41; *People v. Brethauer*, 174 Colo. 29, 482 P. 2d 369 (1971); *People v. Mason*, 185 Colo. 65, 521 P. 2d 1246 (1974).

In fact, in *People v. Padilla*, 182 Colo. 101, 511 P. 2d 480 (1973), the Colorado Supreme Court held that, in issuing a search warrant, a magistrate is confined in his inquiry to the four corners of the affidavit presented to him. *Id.* at 482.

The previously cited empirical data along with the limitations placed upon the magistrate by Colorado Law, cast doubt as to whether the warrant process can discover and eliminate false statements or statements made in reckless disregard for the truth by affiant-officer. This is particularly true in light of the fact that numerous commentators have described the east of falsifying warrants and the prevelance of police perjury.[10] Furthermore, Colorado's more flexible standard regarding threshold showings is especially reasonable where possession of an illegal substance is the issue. In these types of case, motions to suppress become more important than the actual trial and therefore it is consistent with fundamental fairness to pro-

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[9]Note, *Testing The Factual Basis For A Search Warrant*, 67 Colum. L. Rev. 1529; L. Tiffany D. McIntyre and D. Rottenberg, *Detection of Crime*, 119-120 (1967); J. Grano, *A Dilemma for Defense Counsel: Spinelli-Harris Search Warrants and the Possibility of Police Purgery supra*, at 414-415 (1971 U. Ill. L. F. 405, 114-15).

[10]C. Sevilla, *The Exclusionary Rule and Police Perjury*, 11 San Diego L. Rev. 839, 839-840 (1974); *See* text to footnote 9.

vide a full spectrum of due process rights at this critical stage.[11]

The Colorado Supreme Court is not the only state high court that has created a more flexible standard regarding threshold showings.[12] In fact, at least two states have extended the *Franks* decision by shifting the burden of proof onto the prosecution to explain the source of the error once a defendant has demonstrated that an affidavit contains inaccuracies. *People v. Cook,* 148 Cal. Rptr. 626, 22 Cal. 3d 67, 583 P. 2d 130 (1978), *State v. Paster,* 373 So. 2d 170 (La. 1979).

Therefore, Colorado's creation of a more flexible standard regarding threshold showings is both consistent with the decision in *Franks,* and a natural extension of the reasoning which led to the creation of a threshold showing in the first instance.

2. The Modification of the threshold showing Standard by the Colorado Supreme Court in Dailey is Based Upon an Independent and Adequate State Ground.

The decision in *Dailey,* which establishes the Colorado Rule regarding threshold showings, rests on an independent state constitutional ground. *Dailey, supra* at 1074-1075. Therefore, even if this Court should find that the Colorado Supreme Court has extended the minimum requirement for threshold showings established in *Franks* its decision must stand in that it relies on an independent and adequate state ground. This Court has often recog-

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[11]J. Quinn, *McCray v. Illinois: Probable Cause and the Informer Privilege, supra,* 413-417.

[12]See *Commonwealth v. Douzanis,* 384 Mass. 434, 425 N. E. 2d 326 (1981); *Ramsey v. State,* 579 S. W. 2d 920 (Tex. Ct. App. 1979).

nized the right of a State to construe its own constitution as providing more protection than its federal counterpart. *Oregon v. Hass,* 420 U. S. 714 (1975); *Illinois v. Gates,* — U. S. —, 103 S. Ct. 2317, 76 L. Ed. 2d 527, 556-557 (1983) (White, J. Concurring); *Mills v. Rogers,* 457 U. S. 291 (1982); *Cooper v. California,* 386 U. S. 58 (1967).

Oregon v. Hass, directly addressed the freedom to be granted to a State in interpreting its own constitutional enactments. In his majority opinion, Justice Blackmun distinguished between a state's interpretation of federal constitutional law, as opposed to its ability to interpret its own constitution. With respect to the former, this Court stated that: "A state may not impose such greater restrictions as a matter of *federal constitutional law* when this court specifically refrains from imposing them." *Oregon v. Hass, supra,* at 720. Conversely, states are granted great flexibility in interpreting their own laws even if it results in granting greater protections to a defendant or imposing more restrictions upon the police than accorded by this Court's interpretation of the Federal Constitution. "A state is free *as a matter of its own law* to impose greater restrictions on police activity than those this court holds to be necessary upon federal constitutional standards." *Id.* at 720.

State supreme courts have also recognized their right to interpret their own constitutions in a manner that exceeds those protections contained in their federal counterpart. *People v. Brisendine,* 119 Cal. Rptr. 315, 13 Cal. 3d 528, 531 P. 2d 1099 (1975); *People v. Kel'y,* 77 Misc. 2d 264, 353 N. Y. S. 2d 111, 117 (1974). In *State v. Kaluna,* 520 P. 2d 51 (Haw. 1974), the Supreme Court of Hawaii declined to follow the rule established by this Court in *United*

States v. Robinson, 414 U. S. 216 (1973) and *Gufstafson v. Florida*, 414 U. S. 260 (1973) regarding the circumstances under which body searches are permissible. In electing to establish greater protections based upon state law, the Supreme Court of Hawaii stated:

> This Court has final, unreviewable authority to interpret and enforce the Hawaii constitution. We have not hesitated in the past to extend the protections of the Hawaii Bill of Rights beyond those of textually parallel provisions in the Federal Bill of Rights when logic and a sound regard for the purposes of those protections have so warranted.

Id. at 58.

Within the last year, this Court has decided two cases in which a state supreme court interpreted a criminal defendant's constitutional rights more expansively than this Court deemed necessary under the Federal Constitution. In *South Dakota v. Neville*, a case decided on February 22, 1983, Justice O'Connor, in footnote 5 of the majority opinion, addressed whether this Court had jurisdiction to review the underlying decision of the South Dakota Supreme Court. This Court decided it did, in fact, have jurisdiction based upon an analysis that the decision by the South Dakota Supreme Court was not based upon an *independent* state ground. This determination relied on the fact that the South Dakota Supreme Court in interpreting its own constitutional provision, "[had] simply assumed that any violation of the Fifth Amendment privilege also violated, without further analysis, the state privilege". — U. S. at —, 103 S. Ct. 916, n. 5. It was Justice O'Connor's analysis that South Dakota interpreted its own constitution in strict accordance with the relevant portions of the Federal Constitution, as interpreted by this Court. There-

fore, the Supreme Court of South Dakota determined that "every police practice found to violate the Fourth Amendment would, without further analysis, be contrary to the State Constitution as well". *Id.* at 919, n. 5.

The decision in *South Dakota v. Neville* is easily distinguishable from the instant case. Unlike the Neville decision, the *Nunez* case, and more importantly, the *Dailey* case upon which it was based, did not cite federal case law as its authority. Rather, in reaching its decision regarding the proper threshold showing in *Dailey*, the Colorado Supreme Court specifically stated that it might create a more liberal standard based upon the Colorado Constitution. Furthermore, in contrast to South Dakota, Colorado has never stated that it interprets its own constitution in strict compliance with its federal counterpart. In fact, Colorado has a long history of interpreting its constitution in a highly independent manner. *Hernandez v. People*, 385 P. 2d 996 (1963); *People v. Hoinville*, 191 Colo. 357, 553 P. 2d 777 (1976); *Charnes v. DiGiacoma*, 612 P. 2d 1117 (Colo. 1980); *People v. Sporeleder*, 666 P. 2d 135 (Colo. 1983). In these cases, Colorado has granted the criminal defendant greater protections than those provided by this Court's interpretation of the Federal Constitution. In so doing, Colorado has placed greater restrictions upon law enforcement officers.

In *Charnes v. DiGiacoma, supra,* the Colorado Supreme Court acknowledged that in *U. S. v. Miller*, 425 U. S. 435 (1976), this Court had determined that a bank depositor has no reasonable expectation of privacy in checks and deposit slips voluntarily conveyed to the bank and exposed to bank employees in the ordinary course of business. Despite this fact, the Colorado Supreme Court

elected to interpret its own constitution in a more expansive fashion: "*Miller* limits our application of the Fourth Amendment to the facts before us, but it does not determine the scope of protection provided to individuals in Colorado by the constitution of this State." *Charnes, supra,* at 1120.

More recently, in *People v. Sporeleder, supra,* the Colorado Supreme Court, based upon an interpretation of its own constitution, chose not to follow this Court's holding in *Smith v. Maryland,* 442 U. S. 735 (1979). The Colorado Supreme Court stated: "Although Article II, Section 7 of the Colorado Constitution is substantially similar to its federal counterpart, we are not bound by the United States Supreme Court's interpretation of the Fourth Amendment when determining the scope of state constitutional protections." *Sporeleder, supra,* at 140.

In the light of this jurisprudential history, it becomes clear that the *Daily* decision merely extends a long line of cases in which the Colorado Supreme Court exercised its sovereign right to interpret its own constitution differently than this Court's interpretation of a parallel federal enactment. This long tradition of independent interpretation makes this case distinguishable from the facts presented in *South Dakota v. Neville,* and more in line with the holding in *Florida v. Casal,* — U. S. —, 103 S. Ct. 3100 (1983).

On June 17, 1983, the writ of certiorari previously granted in the *Casal* case was dismissed as having been improvidently granted. In a concurring opinion, Chief Justice Burger found that the holding of the Florida Supreme Court rested upon its interpretation of state law,

independent of the fourth amendment even though the Florida opinion did *not* expressly state that it rested, in whole or in part, on state constitutional grounds. Interestingly, Chief Justice Burger noted that the principle state case, *Florida v. Smith,* 233 So. 2d 396 (Fla. 1970), on which the Florida Supreme Court in *Casel* based its decision, "is based entirely upon this Court's interpretation of the fourth amendment of the Federal Constitution". *Casal, supra,* at 3101. In *Dailey,* the Colorado Supreme Court was much more explicit in basing its decision on the Colorado Constitution (Art. II, Section 7). *Dailey, supra,* at 1074.

Even if this Court should interpret the decision in *Dailey* as resting on both state and Federal grounds, it is important to note "the settled rule that where the judgment of a state court rests upon two grounds, one of which is federal, and the other non-federal in character, our jurisdiction fails if the non-federal ground is independent of the federal ground and adequate to support the judgment. *Fox Film Corp. v. Muller,* 296 U. S. 207, 210, *Cramp v. Board of Public Instruction,* 368 U. S. 278, 281." *Jankowitz v. Tollroad Comm'n.,* 379 U. S. 487, 489 (1965).

Furthermore, as Justice Stevens indicated in his dissenting opinion in *South Dakota v. Neville* "If a state court judgment is premised on an adequate state ground, that ground must be presumed independent unless the state court suggests otherwise". *Neville, supra,* 103 S. Ct., at 925-26, (Stevens, J. concurring). In an accompanying footnote, Justice Stevens states further "The burden is on the petitioner-appellant to establish our jurisdiction. We have therefore regularly dismissed cases when the state judgment might have rested on an independent and adequate state ground." *Id.* at 926 n. 4.

For all the reasons cited above, the decision of the Colorado Supreme Court in *People v. Dailey,* was based on an independent and adequate state ground. Therefore, should this Court decide that this issue was "pressed or passed upon" in the instant case, the Court should still refuse to disturb the judgment in *Nunez* in that it rests on an independent and adequate state ground.

3. The issue of the proper threshold showing was never raised before or addressed by the Colorado Supreme Court.

Quite simply, the petitioner did not mention the issue of threshold showings in its notice of interlocutory appeal, (J.A. 94-97), nor is it raised or discussed in the briefs filed with the Supreme Court. Therefore, the Colorado Supreme Court could not have addressed this issue in reaching its decision in the instant case. As the respondent has argued throughout this litigation, the only issue ever addressed by the trial court or the Colorado Supreme Court was the proper standard for disclosure of confidential informants for the purpose of conducting a hearing on a motion to suppress. In fact, the petitioner, in its opening brief to the Colorado Supreme Court, acknowledges the limited scope of this case "The case at bar is focused upon the preliminary showing that a defendant must make before a Court may order the government to reveal an informer's name." (J.A. 106).

This Court has long held that it will not rule on claims or issues "not pressed or passed upon" in the state court below. *State Farm Mutual Automobile Insurance Co. v. Duel,* 324 U. S. 154 (1945); *McGoldrick v. Compagnie Generale,* 309 U. S. 430 (1940).

In a recent decision, this Court has treated the "not pressed or passed upon below" rule as a prudential restriction as opposed to a jurisdictional bar. *Illinois v. Gates, supra,* at 536. *See also, Terminiello v. Chicago,* 337 U. S. 1 (1949). Often the resolution of the issue depends upon whether the issue that was not ruled on below is an entirely new issue or merely an "enlargement" of an issue actually adjudicated in the Court below. *Illinois v. Gates, supra,* at 536.

In *Gates,* this Court declined to address a challenge to the exclusionary rule based upon a number of sound concerns including the relationship between this Court and state courts, the absence of an adequate record, and the practice of affording a state court an opportunity to address the issue by interpreting its own constitution. *Id.* at 537-538.

By virtue of the same reasoning, this Court should not address the issue discussed herein which was not raised before or adjudicated by the Colorado Supreme Court.

D. The Colorado Rule on Disclosure of Confidential Informants is based entirely on State Law, is not inconsistent with Federal Law, and is a reasonable solution to a difficult public policy issue.

Scher v. United States, 305 U. S. 251 (1938), is one of the earliest decisions by this Court regarding the disclosure of confidential informants. *Scher* involved the arrest of an individual for the transportation of "phony" liquor. In addition to receiving information from a confidential informant, police officers arrested Mr. Scher based upon their own observations. Mr. Scher sought

disclosure of the confidential informant in support of his Motion to Suppress. In affirming the appellate court's decision, this Court stated that disclosure of an informant would be denied "unless essential to the defense, as, for example, where this turns upon an officer's good faith". *Id.* at 254.

In *Roviaro v. United States,* 353 U. S. 53 (1957), the purpose and application of the informer privilege was explained in greater detail. This Court first defined the informers privilege as the ability of the government to keep secret the identity of individuals who provide information regarding violations of the law to law enforcement officials. *Id.* at 59. After underscoring its importance, this Court stated, however, that the privilege is not absolute or unlimited and when it interfers with fundamental fairness, the privilege must give way. *Id.* at 59-61. Recognizing the limitations on establishing precise standards, this Court called for a balancing test between the public interest in protecting this type of information versus the right of an individual to pursue his defense.

The most recent substantive pronouncement from this Court in the area of confidential informants, is *McCray v. State of Illinois,* 386 U. S. 300 (1967). In *McCray* the Court rejected the notion that the prosecution must always disclose an informant's identity in a suppression hearing. Rather, the Court stated that the decision of whether to disclose "calls for balancing the public interest in protecting the flow of information against the individuals' right to prepare his defense" *Id.* at 310. Of critical importance to the *Nunez* case, the *McCray* decision did not prohibit the states from modifying the informant's privilege in their discretion. Rather, the *McCray* decision

recognizes the right of state courts to regulate the informants privilege as purely a matter of state common law. *Id.* at 308-312. (See Argument, Section A).

By applying the principles established in *Dailey* and *Bueno*, the Colorado Supreme Court in *Nunez* was exercising its discretion regarding the common-law informer privilege. As was discussed earlier, the Colorado Supreme Court's interpretation of the informer privilege does not implicate federal law. Nevertheless, the Colorado rule is consistent with the federal authority cited above.

Colorado has long endorsed the informer privilege which allows the prosecution to withhold the disclosure of the identity of individuals who furnish information to law enforcement officers. *People v. Del Alamo*, 624 P. 2d 1304 (Colo. 1981); *People v. Korte*, 198 Colo. 474, 602 P. 2d 2 (1979); *People v. Langford*, 191 Colo. 847, 550 P. 2d 329 (1976); *People v. Marquez*, 190 Colo. 255, 546 P. 2d 482 (1976). Furthermore, the Colorado Supreme Court has recognized the important public policy considerations inherent in non-disclosure. *Dailey, supra*, at 1076-1077. The Colorado Supreme Court has also recognized, however, that the privilege cannot be absolute and must give way under certain circumstances. *Id.* at 1077.

The decision in *Nunez* was based entirely on the *Dailey, Bueno,* and *Martinez* cases. In *Dailey,* the Colorado Supreme Court stated that in order to obtain disclosure for the purpose of conducting a Motion to Suppress hearing, the defendant must meet the general test of proving that the disclosure of the informant's identity is essential to a fair determination for the Motion to Suppress. *Dailey, supra,* at 1077. The reasoning behind

this aspect of the *Dailey* decision is best expressed in the following passage:

> In order to have a fair opportunity to carry this burden (that the *affiant* committed perjury or reckless disregard for the truth, where, as here, the affiant claims reliance on an unnamed informant, the defendant needs an opportunity to inquire of the informant as to the information given by him to the officer and to develop background information bearing on whether the officer was reckless in relying on the informant as a source of information. Under these circumstances, if the defendant cannot learn the identity of the informant, he will be denied information essential to the merits of the suppression motion.

Id. at 1076 (emphasis and parenthesis added).

There is an extremely important aspect of the *Dailey* decision that the petitioner has not discussed. In footnote 11 of *Dailey,* the Colorado Supreme Court states that, in addition to the alternatives of either ordering or denying disclosure, the court may conduct an *in camera* hearing where the informant would be presented to the presiding judge for questioning. In other words, this procedure is available if the trial court judge has doubts regarding whether disclosure is appropriate under the applicable legal standards. In the instant case, however, the district attorney never requested an *in camera* hearing. See footnote 4 of the Colorado Supreme Court's decision in *Nunez,* (J.A. 139).

In *Bueno* the Colorado Supreme Court expanded on the general principles set forth in *Dailey.* First, the Colorado Supreme Court reaffirmed the holding in *Dailey* by stating "a defendant seeking disclosure must make an initial showing that the informant will provide infor-

mation essential to the merits of his suppression ruling." *Bueno, supra,* at 935-936. The Court then proceeded to give an example of a situation which satisfies this standard:

> Thus, a defendant will meet this initial burden when he establishes a reasonable basis in fact to believe that an informer does not exist or, if he does, he did not relate to the police the information upon which the police purportedly relied as probable cause for an arrest or search.

Id. at 936.

This statement by the Colorado Supreme Court, along with the general rule regarding disclosure announced in *Dailey,* was the basis for the trial court's decision, (See J.A. 35, 75, 92, and the Colorado Supreme Court's decision, J.A. 138, in the instant case).

The Supreme Court, in *Nunez,* also referred to the case of *People v. Martinez,* 658 P. 2d 260 (Colo. 1983), which focuses on this same standard as well as the important option of an *in camera* hearing.

The Colorado rule regarding disclosure is supported by a number of important public policy concerns. Allegations regarding falsification of warrants and policy perjury are not simply creations of paranoid defendants or overly-zealous defense attorneys. The problem is real and apparently widespread[13]. If an affidavit contains inaccurate or false information and the affiant has claimed reliance upon a confidential informant in obtaining this information, failure to disclose that informant places a virtually insurmountable burden upon the de-

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[13]See text to footnotes 9 and 10.

fendant who seeks to sustain his veracity challenge by proving that the affiant-officer either lied or acted in reckless disregard of the truth[14].

In *State v. Luciow*, 240 N. W. 2d 833, 839 (1976), the Supreme Court of Minnesota recognized the difficulty of meeting this burden in the absence of disclosure: "In some cases where a police officer relies upon an informer, the defendant's right to inquire into the veracity of affidavits would be meaningless absent such disclosure. *See note The Outwardly Sufficient Search Warrant Affidavit: What if it's False?* 19 U. C. L. A. L. Rev. 96, 123." *Id.* at 839. Based on this reasoning, the Minnesota Supreme Court established the standard whereby once a *prima facia* showing is made that *the affidavit* contains material or false statements, the trial court should order disclosure of the informant who gave the information in the affidavit. *Id.* at 839.

In *United States v. Kiser*, 716 F. 2d 1268 (9th Cir. 1983), the Ninth Circuit similarly described a defendant's dilemma in this regard: "A defendant in Kiser's situation has a difficult evidentiary problem. To make a substantial preliminary showing, he must establish a negative that the informant does not exist or uncover the informant's probable identity and the text of his information despite considerable government efforts to protect both." *Id.* at 1271. The Ninth Circuit, therefore, relies on the *in camera* procedure as a means of assisting a defendant in making the necessary threshold show-

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[14]*See generally*, comment, *Franks v. Delaware: A Proposed Interpretation and Application*, 1980 U. Ill. L. F. 601, 619-20; Note, *Testing the Factual Basis for a Search Warrant*, 67 Colum. L. Rev. 1529-1534 (1967).

ing required for a hearing, and of balancing the important competing interests involved. Numerous other courts have endorsed the use of an *in camera* proceeding as a reasonable and just means for resolving this issue. *United States v. Jackson*, 384 F. 2d 825, 827 (3rd Cir. 1967) *cert. denied*, 392 U. S. 932 (1968); *United States v. Hurse*, 453 F. 2d 128, 130-131 (8th Cir. 1971), *cert. denied* 414 U. S. 908 (1973); *United States v. Alexander*, 559 F. 2d 1339, 1344-1345 (5th Cir. 1977) *cert. denied*, 434 U. S. 1078 (1978); *Commonwealth v. Abdelnour*, 417 N. E. 2d 463 (Mass. App. 1980). W. Lafave, *Search and Seizure: A Treatise on the Fourth Amendment* § 4.4 (1978).

In conclusion, the Colorado Supreme Court in *Nunez*, affirmed the trial court's order requiring disclosure based entirely on state grounds. Furthermore, the decision of the Supreme Court is not inconsistent with Federal law and is a reasonable resolution of the difficult public policy issues involved in the balancing of a defendant's right to fundamental fairness versus the government's privilege to withhold the identity of confidential informants.

E. In ruling upon the Motion to Disclose Informant, the Trial Court Judge applied the proper law to the facts and his decision was not clearly erroneous.

Before discussing the law on this point, two facts warrant reiteration: First, the only motion ever adjudicated by the trial court judge was the defendant's Motion to Disclose Informant (J.A. 40-41, 76-77); and second, the statements of defense counsel regarding Sgt. DeNovellis' credibility did not relate to the veracity challange but to

the defendant's burden in gaining disclosure of an informant (J.A. 34).

Subsequent to the filing of the information in the instant case, the defendant filed a number of motions including a Motion to Suppress and a Motion for Disclosure of Informant. On September 9, 1983, a motions hearing was held. As an introductory matter, counsel for the defendant announced that he had two brief witnesses on the disclosure issue (J.A. 25) and then proceeded to state the reasons why the defendant was entitled to disclosure in order to conduct a veracity hearing. (J.A. 31). At that point, with respect to the disclosure motion, counsel for the defendant stated: "We're not questioning the affiant's credibility, Sgt. DeNovellis' credibility. It's just whether this—." (J.A. 31). Before defense counsel could finish his train of thought, he was interrupted by the Judge. Taken in context, the meaning of counsel's previous statement was to underscore the fact that in order to gain *disclosure* under *Daily* and *Bueno,* a defendant must only show inaccuracies in the affidavit itself and does not have to prove the affiant's perjury or reckless disregard for the truth. In support of this interpretation is the remark counsel proceeded to make immediately following the statement regarding Sgt. DeNovellis' credibility: "Any way, it's a crucial point in the affidavit, in a sense, it goes more to the disclosure of the informant so we can call the informant at the suppression hearing then the Motion to Suppress itself." (J.A. 32).

The District Attorney then proceeded to argue that if the defendant does not question the affiant's credibility, he is not entitled to disclosure. (J.A. 32-34). In response to this argument defense counsel argued that ***at that point*** (prior to disclosure), the defendant could not prove inten-

tional misstatement but could only prove reckless disregard for the truth which is an independent ground for attacking the affiant's veracity. Counsel further stated that only upon obtaining disclosure of the informant could the defendant determine whether the affiant had committed perjury.

> Mr. Stern: If I may respond briefly. My statement about Sgt. DeNovellis—I have no information at this point or presented to the court that he intentionally made any misstatements. I think that if we get the confidential informant disclosed and show he was in fact not at the Nunez residence on the 6th, that would cut to the heart of the Motion to Suppress and second of all, that there was recklessness on the part of the affiant in not verifying the information or checking out the information.

(J.A. 34).

After some further comments by the District Attorney and the Judge, counsel expanded on his earlier statement:

> . . . that would carry the burden that there is a good-faith reason to believe what this person said could not possibly have happened. And, therefore, I think that it would be incumbent upon the court to order disclosure so we could have this *alleged* informant in court to say, well, I did say this or I didn't say this or *I said this and it was changed to this*, to find out exactly what did happen. Otherwise, how would a defendant - . . .
>
> All I know is that we have a confidential informant *or an affiant saying a confidential informant allegedly* told him things that could not have been true. How else can we prove or get to the bottom of what happened without getting this informant disclosed.

(J.A. 38-39) (emphasis added).

After this introductory colloquy, the court proceeded to take evidence on the Motion to Disclose Informant.

> Mr. Stern: Your Honor, I'm a little unclear at this point. Are we going to have evidence on the Motion to Disclose Informant? Because if the court rules that the informant is to be disclosed, we would like the informant to testify at the Motion to Suppress as well —
>
> The Court: Now I understand that Mr. Stern. I've heard it four times—believe me I've got it.
>
> . . .
>
> The Court: Well, as I understand it, the witnesses you are going to call now would be in the same position as if you filed the affidavit setting forth their names and what it is that you rely upon to go outside the four corners of this affidavit for the search form to support your position that the identity of the confidential informant has to be disclosed. Those are the witnesses I'm prepared to listen to.

(J.A. 41-42).

After hearing all the testimony the court stated:

> The Court: All right, I'm prepared to rule upon the Motion for Disclosure of Confidential Witnesses without further argument. If counsel wishes to make argument they are welcome to do so.

(J.A. 72).

The court then proceeded to apply the proper law (*Dailey* and *Bueno*) to the facts presented at the hearing and to order disclosure of the confidential informant. (J.A. 75-77). The District Attorney was then given ten (10) days to file an interlocutory appeal. (J.A. 77). The Motion to Suppress based upon a veracity challenge (as well as other grounds) was to be set for hearing on September 24, 1982, if an interlocutory appeal regarding the

judge's requirement that the District Attorney disclose the informant was not filed. (J.A. 77). This date for a setting of the Motion to Suppress was continued until October 4. (J.A. 84).

Subsequent to the September 9, 1983, hearing the defendant filed a Motion to Dismiss, or in the Alternative, to Suppress based upon the District Attorney's decision to not disclose the confidential informant. (J.A. 19-20, 83). On October 7, 1982, the trial court judge issued written Findings of Fact, Conclusions of Law, and Order. (J.A. 91-92).[15] It is absolutely clear that the judge granted suppression of the evidence based only upon the District Attorney's decision not to disclose the confidential informant. The only issue ever adjudicated therefore, was the respondent's Motion to Disclose Informant. The Supreme Court of Colorado recognized this indisputable fact, it was the only issue that was raised before the Colorado Supreme Court; and, therefore, aside from the issue regarding dismissal of the writ as being improvidently granted, is the only issue before this Court.

In Argument, Section D, the respondents discuss how the decisions of the Colorado Supreme Court regarding disclosure are based upon state law, are not inconsistent with Federal law and are reasonable given the public policy concerns involved. Judge Roan merely applied those principles of law to the facts presented by the instant case. It has long been recognized that Find-

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[15]It is unclear whether Judge Roan ordered disclosure for use at trial as well as for the purpose of conducting a suppression hearing. At different times he indicated that he would grant disclosure for the purpose of trial and at other times that he would not. Compare (J.A. 76) *versus* (J.A. 78-79, *and* 91-92)

ings of Fact by trial court judges must be granted great deference. Several recent decisions by the Colorado Supreme Court underscore this basic prudential concept. *People v. McLean,* 661 P. 2d 1157 (Colo. 1983); *People v. Fish,* 660 P. 2d 505 (Colo. 1983); *People v. Martinez,* 658 P. 2d 260 (Colo. 1983). Courts in the federal system also recognize the wisdom of this policy.

Federal courts, also, will not overturn the findings of a district court unless they are clearly erroneous. For example, the Eighth Circuit Court recently stated that "[w]e will not reverse the findings of the district court, which are based on credibility determinations, as long as substantial evidence exists to support the conclusions reached and no clear error appears on the record." *United States v. Green,* 678 F. 2d 81, 84 (8th Cir. 1982) *cert. denied,* 103 S. Ct. 375 (1982). *See also, United States v. Ballesteros-Cordova,* 586 F. 2d 1321 (9th Cir. 1978); *United States v. Cruz,* 581 F. 2d 535 (5th Cir. 1978).

In the instant case, Judge Roan heard a great deal of testimony and determined that the defendant had met his burden for obtaining disclosure of the confidential informant. A review of the record indicates that there was substantial evidence upon which to base this determination and that it was not clearly erroneous. Therefore, the credibility determinations and the findings of fact entered by Judge Roan should not be disturbed by this Court.

CONCLUSION

Based on all of the arguments contained herein, the decision of the Colorado Supreme Court in *Nunez* should be affirmed.

Respectfully submitted,

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No. 82-1845

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

THE STATE OF COLORADO,

Petitioner,

—vs.—

ANTONIO GUADALUPE NUNEZ,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF COLORADO

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES UNION OF COLORADO AS *AMICUS CURIAE*

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SUMMARY OF ARGUMENT

1. Certiorari was improvidently granted herein because the decision to suppress the evidence in question was not a final judgment within the meaning of 28 U.S.C. § 1257.

2. Even if this Court has jurisdiction under 28 U.S.C. § 1257, the decision below rests on independent and adequate state grounds. The Colorado court merely applied Colorado's flexible evidence rules governing the informant's privilege and adopted an order of preclusion as the means to enforce its discovery order. Such a decision does not involve a construction of the Fourth Amendment. Even if Fourth Amendment principles might dictate a similar result, the Colorado court's action was an application of Colorado's evidence and discovery rules and, thus, is not appropriate for review by this Court.

3. The only question properly before

this court is whether Colorado may adopt a flexible set of evidence rules governing the informant's privilege and elect to sanction non-compliance with an order of preclusion. No basis exists for arguing that states must recognize an absolute informant's privilege. Similarly, once a state adopts a flexible rule governing the informant's privilege, it is free to adopt suppression as an appropriate means of enforcing discovery orders.

INTEREST OF AMICI*

The American Civil Liberties Union is a non-partisan membership organization of 250,000 persons dedicated to preserving and enforcing our constitutional heritage. The right to confront an anonymous informant in order to challenge his or her veracity is a matter of fundamental fairness. Where, as here, a state court adopts flexible rules of evidence permitting the targets of an anonymous accusation to discover an informant's identity under certain conditions and adopts appropriate preclusion sanctions for a failure to comply with discovery, the state advances basic fairness without the necessity of passing on constitutional issues. In this case, the Colorado courts have advanced interests of fundamental fairness, not by the

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* Consents to the filing of this brief Amici Curiae have been obtained from the parties. Letters of consent from each party will be lodged with the Clerk of the Court.

enunciation of constitutional law, but on the basis of adequate and independent state-law grounds. Amici respectfully submit this brief in support of the power of a state court to protect and preserve fundamental fairness by the adoption of enlightened state rules of evidence and discovery.

I

THE WRIT OF CERTIORARI
SHOULD BE DISMISSED
FOR WANT OF JURISDICTION

Under longstanding and settled law, this Court lacks jurisdiction over this case, which arises on an interlocutory appeal from a motion to suppress. Accordingly, the writ should be dismissed as improvidently granted.

The statute which grants this Court jurisdiction to review state court decisions, 28 U.S.C. § 1257, denies the Court power to review judgments which are not "final." A criminal case has repeatedly been held to be "final" within the meaning of § 1257 only upon entry of a sentence. See, e.g., Parr v. United States, 351 U.S. 513, 518 (1956); Bateman v. United States, 429 U.S. 1302 (1976).[1]

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[1] Prior to the enactment of 18 U.S.C. § 3731, the Court decided a single non-final state criminal case. California v. Stewart, reported sub nom Miranda v. Arizona 384 U.S. 436, 498 n. 71 (1966). We have been unable to discover a single subsequent case relying [cont'd. on next pg]

Even in cases arising from federal courts, where this Court has statutory power to review non-final cases under 28 U.S.C. § 1254, the Court has adopted a policy as a prudential matter of not reviewing criminal cases which arise on interlocutory appeal.

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on Stewart, or addressing whether the limited exception of that case would apply. In five additional cases, the jurisdictional question was not raised by the parties and appears to have escaped the Court's attention as well. Michigan v. Tyler, 436 U.S. 499 (1978); United States v. Washington, 431 U.S. 181 (1977) (review from local D.C. case); Illinois v. Lafayette, 77 L. Ed. 2d 65 (1983); Illinois v. Andreas, 77 L. Ed. 2d 1003 (1983); Illinois v. Batchelder, 77 L. Ed. 2d 1267 (1983). In light of Cogen, DiBella, and the failure of Congress to overrule those cases when it enacted 18 U.S.C. § 3731, we do not believe that these unexplained decisions support jurisdiction over this case under § 1257.

See e.g., Flynt v. Ohio, 451 U.S. 619 (1981); Abney v. United States, 431 U.S. 651, (1977); DiBella v. United States, 369 U.S. 121 (1962). The Court has stressed that this prudential policy is based on longstanding Congressional policy. DiBella, supra. The only exception the Court has made has been for the special case of double jeopardy, where the very constitutional right could not be vindicated without departing from the otherwise uniform judicial rejection of interlocutory review of criminal cases.

In light of these considerations, it is hardly surprising that this Court has steadfastly held that the grant or denial of an interlocutory appeal of a motion to suppress is not "final" within the meaning of §§ 1254 and 1257. Cogen v. United States, 278 U.S. 221 (1929); DiBella v. United States, supra.

The relatively recent enactment of a statute authorizing appeal by the federal

government from certain motions to suppress under carefully specified circumstances and procedures, 18 U.S.C. 3731, confirms that decisions on interlocutory motions to suppress are not "final" within the meaning of the appellate jurisdictional statutes. First, if such decisions were "final," there would have been no need for enactment of § 3731, which creates an exception to 28 U.S.C. § 1291. Moreover, as enactment of § 3731 demonstrates, Congress was perfectly capable of altering the appellate jurisdictional statutes to permit interlocutory review of motions to suppress when it chose to. Congress' failure to permit review of motions to suppress arising from state courts at the same time it permitted such review in certain federal cases must be seen as a deliberate legislative choice this Court is not free to overturn. Cf. TVA v. Hill, 437 U.S. 153 (1978).

Any suggestion that the factors set forth in Cox Broadcasting v. Cohn, 420 U.S. 469 (1975), would permit this Court to take jurisdiction in this case is untenable. Jurisdiction is unavailing under Cox for precisely the same reasons the Court recently dismissed the writ of certiorari for want of jurisdiction in Flynt v. Ohio, supra.

The Court observed in Flynt that "in most, if not all, of the cases falling within" the Cox exceptions, "not only was there a final judgment on the federal issue for purposes of state court proceedings but there were no other federal issues to be reviewed," and thus "no probability of piecemeal review with respect to federal issues." 451 U.S. at 621. Here, as in Flynt, however, "it appears that other federal issues will be involved in the trial court." Id. Indeed, the very frequency of a variety of constitutional issues that arise in nearly every criminal

case goes far to explaining the absence of interlocutory review of criminal cases under the Cox exceptions.[2]

The only justification for departing from the clear command of § 1257 can be a belief that, notwithstanding the clear congressional directive, a state should always be permitted review in this Court of a decision which affects its interests. According to that argument, since the criminal case here sought to be reviewed might, if not reviewed by this Court now, result in an acquittal,[3] the state needs review now to

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[2] The four Cox categories, found inapplicable in Flynt, are inapplicable here as well. The third category, the most nearly available, is not satisfied here because the state could "lose on the merits," e.g. by dismissal of the indictment prior to trial and still bring the question raised up on review from that final judgment. The fourth is even less arguably applicable here than it was in Flynt, since the "refusal immediately to review the state court decision" would not erode any identifiable federal policy.

[3] It is, of course, equally likely that the [cont'd. on next pg]

ensure that it gains review at some point. There are two insuperable difficulties with that approach.

First, it consigns the congressional limitations on this Court's review in § 1257 to mere "policies," whereas § 1257 is jurisdictional, especially as concerns criminal cases, and especially in light of Congress's failure to pass a counterpart to 18 U.S. § 3731 for state court rulings on motions to suppress.

Second, a doctrine affording the state an opportunity to remedy in this Court every ruling against its interests is contrary to this Court's repeated rejection of a similar argument where individual rights are concern-

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state courts, assuming that there was no other evidence against Mr. Nunez, would order the indictment dismissed. In that event, presumably the state would be able to seek review without any bar by either § 1257 or the double jeopardy clause.

ed. Again and again in recent years, when the Court has determined that various infringements of individual rights are not subject to review because of statutory or judge-made barriers, it has rejected the argument that those barriers should fall to permit judicial review, even when without such relaxation the individual whose rights were violated would be left without judicial protection. See, e.g., Stump v. Sparkman, 435 U.S. 349 (1978); City of Los Angeles v. Lyons, 75 L. Ed. 2d 675, 690-91 (1983); Rizzo v. Goode, 423 U.S. 362 (1976); O'Shea v. Littleton, 414 U.S. 488 (1974); Chappel v. Wallace, 76 L. Ed. 2d 349 (1983); Fitzgerald v. Nixon, 73 L. Ed. 2d 349 (1982).

If the Court refused to bend prudential or equitable barriers to the vindication of constitutional rights in those cases (and others), surely its solicitude for Colorado's right to bring an immediate interlocutory

appeal of an order to reveal an informant should not be greater.

II

THIS COURT LACKS JURISDICTION TO REVIEW THE DECISION OF THE COLORADO SUPREME COURT BECAUSE IT RESTS ON INDEPENDENT AND ADEQUATE STATE LAW GROUNDS

Petitioners seek to characterize this case as an effort to remedy an "emasculation" of the informant's privilege. However, in ruling that the informant's privilege may not defeat limited discovery aimed at testing the veracity of statements made in support of a search warrant by an anonymous informant, the Colorado Supreme Court decided, not a federal question, but merely an issue of Colorado evidence law. Moreover, in electing to utilize an exclusionary rule as a means to enforce its discovery ruling, the Colorado court merely exercised the power to select an enforcement mechanism which it deemed approp-

riate to implement Colorado evidence law. Unless petitioner is prepared to argue that prosecutors are constitutionally entitled to an absolute informant's privilege regardless of applicable local law, no federal question whatever is posed by this appeal. Nothing in the decision of the Colorado court suggests that its ruling was based on federal law. Indeed, by relying on earlier Colorado cases such as People v. Dailey, 639 P.2d 1068 (1982) and People v. Bueno, 646 P.2d 931 (1982), the Court below reiterated the state law basis for its decision. Unless state courts are forbidden by a provision of the federal constitution from adopting flexible evidence rules governing the informant's privilege and from adopting appropriate tools for implementing their discovery orders, no federal question is posed by this case.

In an effort to create a federal question, petitioners appear to argue that the

Colorado court was applying Fourth Amendment principles when it ordered the suppression of evidence. Not every decision to preclude proof is, however, a Fourth Amendment decision. The issuance of a preclusion order as a sanction for the failure to comply with a discovery order is a routine exercise of judicial superintendence. While Fourth Amendment principles might well have dictated a similar result in this case, the fact remains that the court below was merely enforcing Colorado law, not the Fourth Amendment. Accordingly, whatever the result might be as a matter of Fourth Amendment jurisprudence[4], the decision of the Court below was based on

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4. Given the existence of adequate and independent state grounds upholding the decision below, a discussion of whether the Fourth Amendment would require the same result would be an advisory opinion and, thus, beyond the jurisdiction of the Court. E.g., Minnesota v. National Tea Company, 309 U.S. 551, 557 (1940); Herb v. Pitcairn, 324 U.S. 117 (1945).

adequate and independent state law grounds and, thus, may not be disturbed. E.g., Wainwright v. Sykes, 433 U.S. 72 (1977); Henry v. Mississippi, 379 U.S. 443 (1965); Fox Film Corp. v. Muller, 296 U.S. 207 (1935).

In South Dakota v. Neville, 74 L. Ed 2d 748 (1983), the Court ruled that when a state court decision purports to rest on both Federal and State constitutional grounds, review of the Federal constitutional question is appropriate in those settings where it appears that the Federal and State constitutions were viewed as identical. 74 L. Ed 2d at 754, N. 5. Thus, where the interpretation of a state constitutional provision appears to turn on a construction of a parallel federal provision, the state ground is adequate, but not independent. Delaware v. Prouse, 440 U.S. 648 (1979).

In the instant case, however, the Colorado court did not adopt its evidence rules

because it wished to establish state rules which paralleled and were required by the Fourth Amendment. Indeed, in People v. Dailey, 639 P. 2d 1068 (1982), the Colorado Supreme Court explicitly recognized that in fashioning evidentiary rules governing the informant's privilege it was relying upon "state law" and quite possibly going beyond Fourth Amendment requirements. 639 P. 2d at 1075. Accordingly, the Colorado decision rests upon both adequate and independent state law grounds within the meaning of Neville.

III.

THE FEDERAL CONSTITUTION DOES NOT BAR A STATE FROM PERMITTING A DEFENDANT TO DISCOVER THE IDENTITY OF AN ANONYMOUS INFORMANT IN ORDER TO CHALLENGE HIS VERACITY

A defendant might well be expected to argue that the federal constitution guarantees him the right to discover the identity of an anonymous informant in order to challenge his veracity. However, whatever the correct resolution of such a constitutional argument, Colorado chose to resolve it on state law grounds by permitting the discovery of informants' identities under certain circumstances as a matter of Colorado evidence law. Moreover, Colorado chose to enforce its discovery rule by imposing a preclusion sanction on a prosecutor who failed to comply with a discovery order. Thus, the precise issue posed by this case is not whether Colorado must adopt a flexible informant's priv-

ilege rule and back it up with a preclusion sanction, but whether it may do so. See PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980).

Petitioners have cited numerous cases in which this Court has attempted to draw the appropriate balance between a defendant's right to know and the state's right to confidentiality. However, each case deals with the extent to which states must provide a defendant with information. With respect, they are utterly irrelevant to the question of whether a state may choose to provide more information than the Fourth Amendment requires.[5] Just as this Court in PruneYard

[5] Amici believe that had Colorado elected to adopt a regressive policy and deny discovery herein, the principles of the Fourth and Fourteenth Amendments would have been violated. Given the adequate and independent state law ground on which the decision below rests, it is both unnecessary and improper to reach the constitutional question.

upheld California's right to go beyond the reach of the First Amendment in the context of privately owned shopping centers, so Colorado is entitled to go beyond petitioner's view of the Fourth Amendment in the context of anonymous informants. It can hardly be contended that the federal constitution forces the states to use anonymous informants when they do not wish to do so.

CONCLUSION

For the foregoing reasons, the writ of certiorari should be dismissed.

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No. 82-1845

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

THE STATE OF COLORADO,
Petitioner,

vs.

ANTONIO GUADALUPE NUNEZ,
Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF COLORADO

BRIEF OF COLORADO DISTRICT ATTORNEYS COUNCIL, AS AMICUS CURIAE IN SUPPORT OF THE PETITIONER

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QUESTION PRESENTED FOR REVIEW

On the defendant's motion to suppress evidence seized pursuant to search warrant, when the issue before the court is the credibility of the informant, rather than the affiant, does the trial court's order requiring the prosecution to name the confidential informant go beyond Fourth Amendment requirements?

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CITATION TO OPINION BELOW
People v. Nunez,
658 P.2d 879 (Colo. 1983)

This brief is filed pursuant to Rule 36 of the Supreme Court Rules. Consent to file has been granted by counsel for the parties, and letters of consent of the

parties have been filed with the Clerk of this Court.

INTEREST OF AMICUS

The Colorado District Attorney's Council is a separate legal entity comprised of members of the District Attorney's Offices in the twenty-two Colorado Judicial Districts.

The Council provides programs of education and training, publications, and administrative assistance to the various District Attorneys' Offices in the State of Colorado. These programs are intended to implement the Council's goal of promoting, fostering, and encouraging an effective administration of justice in Colorado and helping to ensure the safety of the public and the protection of the constitutional rights of accused persons.

Because it is an association of prosecuting attorneys, the Council is well aware of the problems faced by state and federal law enforcement officers in their daily efforts to deal with an increasing crime rate. Specifically, as relates to this case, the Council is aware that the drug problem, with the related involvement of countless burglaries, robberies, thefts and other crimes of violence, is ever increasing in intensity and that the vast majority of prosecutions of persons "pushing" sales of narcotics and other controlled substances are made possible because of use by the police of information furnished by confidential informers. Without confidential informants, enforcement of the criminal law in the field of narcotics would be greatly impaired.

The position of the Council is that the rule applied by the trial court and the

Colorado Supreme Court in the case at bar goes beyond the dictates of the Fourth Amendment and misapplies the holdings of this Court. Further, the rule nullifies the qualified privilege of the confidential informant, thus greatly impeding law enforcement efforts.

SUMMARY OF ARGUMENT

The Supreme Court of the State of Colorado has mistakenly construed the decisions of this Court which relate to confidential informants and has extended such decisions beyond the scope of the Fourth Amendment.

The Court has expressly recognized a limited privilege on the part of the government to withhold the name of a confidential informant in order to facilitate effective law enforcement. The decision of the Colorado Supreme Court vitiates this privilege by permitting an accused, by attacking the veracity of the

informant, to obtain the name of the informant.

The Supreme Court of Colorado failed to recognize the crucial distinction, recognized by this Court, between disclosure of the informant's name for purposes of trial and disclosure of the informant's name for purposes of a suppression hearing.

The result reached by the Colorado Supreme Court is not mandated by the Fourth Amendment because no state action is involved; no unlawful police conduct is deterred since none occurred; and this Court's preference for a warrant is ill-served.

ARGUMENT

THE COLORADO SUPREME COURT'S DECISION IN THIS CASE MISAPPLIES THIS COURT'S DECISIONS IN THE AREA OF CONFIDENTIAL INFORMANTS, REACHES A CONCLUSION WHICH GOES BEYOND THE MANDATE OF THE FOURTH AMENDMENT, AND VITIATES THE QUALIFIED PRIVILEGE OF A CONFIDENTIAL INFORMANT.

In the case at bar, the trial court at a suppression hearing ordered the prosecution to reveal the name of a confidential informant who had given information used in obtaining a search warrant. This order was based on testimony by the defendant that conflicted with information obtained from the confidential informant. The veracity of the affiant police officer was not at issue, only the veracity of the informant. The Colorado Supreme Court affirmed the trial court's order. People v. Nunez, 658 P.2d 879 (Colo. 1983). We submit that when only the veracity of the informant is at issue, no state action is involved and the Fourth Amendment is not implicated.

As set forth by this Court:

> What is usually referred to as the informer's privilege is in reality the Government's privilege to withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with enforcement of that

> law. [citations omitted.] The purpose of the privilege is the furtherance and protection of the public interest in effective law enforcement. The privilege recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law-enforcement officials and, by preserving their anonymity, encourages them to perform that obligation. Roviaro v. United States, 353 U.S. 53, 60.

The extremely adverse consequences to law enforcement of disclosing the identity of confidential informers is illustrated by the opinion in State v. Burnett, 42 N.J. 377, 201 A.2d 39 from which we quote at pertinent length:

> If a defendant may insist upon disclosure of the informant in order to test the truth of the officer's statement that there is an informant or as to what the informant related or as to the informant's reliability, we can be sure that every defendant will demand disclosure. He has nothing to lose and the prize may be the suppression of damaging evidence if the State cannot afford to reveal its source, as is often the case. And since there is no way to test the good faith of a defendant who presses the demand, we must assume the

> routine demand would have to be routinely granted. The result would be that the State could use the informant's information only as a lead and could search only if it could gather adequate evidence of probable cause apart from the informant's data. Perhaps that approach would sharpen investigatorial techniques, but we doubt that there would be enough talent and time to cope with crime on that basis. Rather we accept the premise that the informer is a vital part of society's defensive arsenal. (Emphasis supplied.) The basic rule protecting his identity rests upon that belief.

The foregoing quotation was set forth at length, and approved by this Court in McCray v. Illinois, 386 U.S. 300, 306-307.

While recognizing the importance of an informer's privilege, this Court has also recognized that this privilege is not absolute. In Roviaro, this Court held that identity of the informer must be disclosed whenever the informer's testimony may be helpful to the defense of the accused. Roviaro, unlike the case at bar, involved a confidential informant who was an "eye or

ear witness" and thus potentially a witness at trial.

This Court in McCray, pointed to the crucial difference between the informant's privilege when the informant is a potential witness at trial and the informant's privilege when the informant has only given information upon which to base a search warrant. This Court held that it was unwilling to impose any absolute rule requiring disclosure when the informant is a potential witness at trial and much less so "where the issue is the preliminary one of probable cause, and guilt or innocence is not at stake." 386 U.S. at 311.

In Nunez, the Colorado Supreme Court relied heavily on its prior decision of People v. Dailey, 639 P.2d 1068 (Colo. 1982). Dailey like Nunez involved the disclosure of a confidential informant for suppression hearing purposes not for the purposes of a trial on the merits. In

Dailey, the Colorado Supreme Court applied the Roviaro balancing test, a test formulated to determine when the truthfinding process of a trial on the merits mandates that a confidential informant's name be disclosed. The court ignored the critical distinction set forth in McCray, between disclosure for purposes of the truthfinding function and disclosure for purposes of a suppression hearing, the results of which often thwart the truthfinding function.

The Colorado Supreme Court in the case before this Court imposes what for all practical purposes is an absolute rule requiring disclosure of an informant at a preliminary proceeding where the issue is merely one of probable cause for search and seizure.

Franks v. Delaware, 438 U.S. 152, dealt with the issue of whether a defendant has the right, under the Fourth and

Fourteenth Amendments, to challenge the truthfulness of factual statements made in an affidavit supporting a search warrant. The Court held that the Fourth Amendment gives a defendant the right after an appropriate showing to challenge "the deliberate falsity or reckless disregard," but "only that of the affiant, not of any nongovernmental informant." 438 U.S. at 171.

The Colorado Supreme Court in the instant case, by extending veracity hearings to challenges of the truthfulness of the informant not the police officer-affiant, has granted rights to the defendant which are beyond the scope of the Fourth Amendment and serve no recognized Fourth Amendment purpose.

This Court has long recognized that the impact of the Fourth Amendment is on the regulation and control of government action. In Burdeau v. McDowell, 256 U.S.

465, certain papers belonging to a private individual were stolen by another private individual and were ultimately given to the United States Department of Justice. The Court held that the Fourth Amendment "was not intended to be a limitation upon other than governmental agencies" and does not provide a redress for wrongs done by private individuals. 256 U.S. at 475.

In the Nunez case, no evidence was presented, nor even allegation made, that the police officer-affiant either lied or recklessly disregarded the truth in preparing the affidavit for the search warrant. Indeed, the evidence was scant that the informant might have lied. Thus in Nunez, no improper state action was alleged and the decision in Nunez goes beyond the dictates of the Fourth Amendment.

Amicus emphasizes that the Nunez result, i.e., predicating any decision at a

suppression hearing on the issue of whether an informant may have lied, serves no recognized Fourth Amendment purpose.

The exclusionary rule, by excluding in a criminal prosecution evidence obtained in violation of a defendant's Fourth Amendment rights, was designed to serve one primary purpose: to deter unlawful police conduct. Stone v. Powell, 428 U.S. 465.

In evaluating the effectiveness of this justification for the exclusionary rule as applied to the facts of this case, amicus respectfully directs this Court's attention to language from one of the many pertinent decisions of this Court, Michigan v. Tucker, 417 U.S. 433, 447.

> The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right. By refusing to admit evidence gained as a result of such conduct, the courts hope to instill in those particular investigating officers, or in their future counterparts, a

> greater degree of care toward the rights of an accused. Where the official action was pursued in complete good faith, however, the deterrence rationale loses much of its force.

Clearly any exclusion of evidence predicated on the veracity of a confidential informant cannot serve a deterrent purpose where there is no allegation nor evidence that the affiant lied or was reckless in relying on the informant's information.

In its recent decision of Illinois v. Gates, ___ U.S. ___, 103 S.Ct. 2317, this Court abandoned the "two-pronged test" established in Aguilar v. Texas, 378 U.S. 108, and Spinelli v. United States, 393 U.S. 410, for determining whether an informant's tip establishes probable cause for issuance of a warrant and adopted a totality of the circumstances analysis.

Significantly Gates involved an anonymous informant and as this Court stated:

> [T]he veracity of persons supplying anonymous tips is by hypothesis largely unknown, and unknowable ... While a conscientious assessment of the basis for crediting such tips is required by the Fourth Amendment, a standard that leaves virtually no place for anonymous citizen informants is not. 103 S.Ct. at 2332.

The rule adopted by Nunez would certainly leave no place for anonymous informants. If questioning the veracity of an informant leads to an order for disclosing that informant, an anonymous informant could never be used. At a minimum there is a tension between Gates and the case now before this Court.

Also pertinent to the Court's inquiry is the following language from Gates:

> If the affidavits submitted by police officers are subjected to the type of scrutiny some courts have deemed appropriate, police might well resort to warrantless searches, with the hope of relying on consent or some other exception to the warrant clause that might develop at the time of the search. In addition, the possession of a warrant by officers conducting an arrest or

> search greatly reduces the perception of unlawful or intrusive police conduct, by assuring "the individual whose property is searched or seized of the lawful authority of the executing officer, his need to search, and the limits of his power to search." [Citations omitted.] 103 S.Ct. at 2331.

We submit that the "scrutiny" given the warrant in the instant case might do the same type of damage to this Court's expressed preference for the warrant requirement.

CONCLUSION

The amicus urges, for the reasons stated in this brief and supported by the record, that the Colorado Supreme Court misapplied this Court's decisions in the area of confidential informants and reached a conclusion not in accord with the Fourth Amendment.

The result reached by the Colorado Supreme Court goes beyond the purposes of the Fourth Amendment, which is intended to

regulate governmental conduct and not the conduct of private individuals.

Most importantly, the decision of the Colorado Supreme Court emasculates the qualified privilege of a confidential informant by allowing an accused, who offers any evidence, to obtain the name of an informant -- even though, as in this case, no governmental action has been questioned. This result will severely impede law enforcement efforts.

WHEREFORE, amicus supports the petitioner's request for the Court to reverse the decision of the Supreme Court of Colorado in People v. Nunez, 658 P.2d 879 (Colo. 1983).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that on the 16th day of November, 1983, I placed in the United States Mail, postage prepaid and properly sealed and addressed, 3 copies each of the foregoing Brief of Amicus Curiae to the parties of record in this case.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether a criminal defendant seeking to suppress evidence obtained pursuant to a facially valid warrant that was based in part on information supplied by a confidential informant may compel the disclosure of the informant's identity by offering his own testimony tending to show that the informant's statements were false.

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INTEREST OF THE UNITED STATES

This case presents a question concerning the circumstances in which the prosecution may be required to disclose the identity of a confidential informant during a hearing on a motion to suppress evidence challenging the accuracy of information contained in a search warrant affidavit. The use of informants is vital to the law enforcement efforts of the United States in many areas, particularly those dealing with organized crime and narcotics. The premature or unnecessary disclosure of informants' identities can

subject them to reprisals, and even the possibility that such disclosures might occur can substantially undermine the government's ability to conduct investigations, gather evidence, and bring prosecutions. The United States therefore has a substantial interest in ensuring that the identities of confidential informants not be revealed unnecessarily.

STATEMENT

On November 7, 1981, Sergeant DeNovellis of the Denver police force executed an affidavit stating in part that a confidential informant had told him that during the previous day the informant saw respondent, at respondent's home, in possession of a large amount of heroin. The affidavit recited that the informant said he had seen respondent diluting the heroin and packaging it in ballons, and that respondent had told the informant that respondent had just returned from Mexico with five ounces of heroin. Sergeant DeNovellis's affidavit further stated that the informant was familiar with the appearance of heroin and had admitted using it, and that the informant had proved reliable on at least two occasions in the previous 18 months, "giving your affiant information involving narcotic activity, and resulting in the recovery of a quantity of heroin." J.A. 5, 135-136.

On the basis of this affidavit, a local judge issued a search warrant. Police officers searched respondent's house pursuant to the warrant. Respondent was at home during the search and the officers found heroin on respondent's person. He was arrested and charged with possession of heroin. Before trial, respondent filed motions to compel the disclosure of the informant's identity and to suppress the heroin. J.A. 136.

At a hearing on the motions, respondent testified that he had been on a hunting trip from October 31 until November 6 and that he had not been to Mexico during that period, nor told anyone that he had been to Mexico during that period. Respondent testified that only family members had been in his house on November 6; he also testified that he knew of heroin only through television and newspapers. Sergeant DeNovellis also testified at the suppression hearing and stood by the statements he made in his affidavit. J.A. 43-46, 54, 59-64.

On the basis of this testimony, the trial court ordered the State to disclose the identity of the confidential informant to respondent. When the State refused to do so, the trial court ordered the heroin suppressed. The State appealed, and the Colorado Supreme Court affirmed. J.A. 134-139. The Colorado Supreme Court explained (*id.* at 138-139; footnotes and citations omitted):

> The People argue that the disclosure of confidential informants is limited to situations in which the veracity of the affiant-police officer is successfully attacked. This contention misapprehends the holding of *People* v. *Dailey*[, 639 P.2d 1068 (Colo. 1982)]. *Dailey* recognized that errors in an affidavit for a search warrant can result "from the informant's perjury or reckless disregard for the truth, or from the negligence or good faith mistake of either the officer or the informant." 639 P.2d at 1075. When, following a veracity hearing, the probability of one of those kinds of error has been found, the election of remedies or sanctions is left to the discretion of the [trial] court. The necessary foundation for the court's exercise of discretion in ordering disclosure is a showing of a reasonable basis in

> fact to question the accuracy of the informant's recitals.
>
> * * * Where the [trial] court has determined that the defendant has shown a good faith basis in fact to question the accuracy of an affidavit containing recitals based on information supplied by an unnamed informant and consequently has ordered that the informant be disclosed or be produced for an *in camera* hearing, we will not disturb that ruling.

SUMMARY OF ARGUMENT

The decision of the Colorado Supreme Court is inconsistent with two important principles established by this Court—the rule of *Franks* v. *Delaware*, 438 U.S. 154 (1978), that a facially valid search warrant can be challenged only if the defendant makes a substantial showing that the affiant's statements were deliberately false or recklessly inaccurate; and the informant's privilege, which permits the government to withhold the identity of a confidential informant unless the defendant makes a compelling showing that he must learn the informant's identity.

1. In *Franks*, the Court emphasized the costs of allowing a warrant that shows probable cause on its face to be challenged in a suppression hearing. Such challenges use judicial resources and give defendants an opportunity to discover the government's case. For these reasons, the Court in *Franks* took care to hold that a defendant is not entitled to a hearing on his challenge to a facially valid warrant unless he makes a substantial preliminary showing that the affiant's statements were deliberately false or recklessly inaccurate.

The only showing respondent made was his own self-serving testimony contradicting the informant's

statements. Since many criminal defendants will perjure themselves in order to obstruct a prosecution, to allow a defendant's testimony alone to compel a hearing on the truthfulness of a search warrant affidavit is almost tantamount to requiring such a hearing on the defendant's demand—a course emphatically rejected by *Franks*. Moreover, respondent's testimony tended to show only that the informant's statements were false. Even if credited, respondent's testimony did not tend to show—what *Franks* and basic Fourth Amendment principles require—that the *affiant's* statements were recklessly or deliberately false.

Not only did respondent's testimony fail to satisfy *Franks*; it did not approach being sufficient to require the disclosure of the informant's identity. The reasons for the informant's privilege are apparent. The government often continues to use an informant after he has supplied information in connection with a particular prosecution; and, more important, an informant whose identity has been revealed can be subject to the most serious reprisals at the hands of those he incriminates. Moreover, because potential informants will commonly be extremely wary—often with good reason—not only actual disclosures of informants' identities, but the threat of disclosure, or even the perception that disclosure is a serious possibility, can have a devastating effect on the ability of law enforcement authorities to recruit informants. Indeed, even in camera disclosures can have a harmful effect.

For these reasons, the Court has ruled that a defendant must make a substantial showing of need in order to discover an informant's identity even when the informant's testimony will be relevant to the question of guilt or innocence. When an informant's

testimony will be relevant only at a suppression hearing, the defendant's burden is much greater. And when the informant's testimony is sought only to impeach a search warrant that is valid on its face, the disclosure of the informant's identity should be permitted, if at all, only in the most extraordinary circumstances.

The Colorado Supreme Court allowed respondent to meet this burden with his own self-serving testimony. If such testimony is sufficient to require the disclosure of the informant's identity, any defendant who is willing to contradict the statements of an informant can defeat a criminal prosecution entirely whenever law enforcement authorities fear that disclosing the informant's identity will risk subjecting him to reprisals, because most prosecutors will permit crucial evidence to be suppressed before they will take such a risk. An approach that permits a defendant to escape prosecution so easily should not be sanctioned.

2. Even when a trial court determines that a defendant has made the substantial preliminary showing required by *Franks*, it should not order the disclosure of the informant's identity, even in camera, as a matter of course. The court can allow cross-examination of the affiant by defense counsel. In addition, the affiant can be questioned more searchingly in camera by the court.

Such examination of the affiant should ordinarily be sufficient to enable the trial judge to decide if the affiant has deliberately or recklessly made false statements. The informant's testimony should seldom be necessary, because the issue is the credibility of the affiant—who is usually a law enforcement officer—and a trial judge will usually be able to reach a con-

clusion about the officer's truthfulness by observing his testimony. Indeed, if the informant's identity is being withheld because of the danger of reprisals, any testimony the informant gives under circumstances in which he fears that the defendant might learn his identity—circumstances that can include an in camera hearing—will necessarily be suspect.

For these reasons, requiring the testimony of the informant, even in camera, should be the last resort. But if the trial judge nevertheless decides that the informant's testimony is necessary, we can think of no reason why an in camera examination of the informant will not always suffice. It is true that adversary proceedings are customary in our system, but the Fourth Amendment is an exception; the Warrant Clause reflects a judgment that an in camera, ex parte proceeding is adequate to protect the interests underlying that Clause if an adversary proceeding would impose excessive costs on important societal interests.

ARGUMENT

RESPONDENT'S TESTIMONY DID NOT ENTITLE HIM TO COMPEL THE DISCLOSURE OF THE INFORMANT'S IDENTITY

A. The decision of the Colorado Supreme Court is inconsistent with this Court's decisions in two distinct and important ways.[1] First, the Colorado Supreme Court did not heed the rule of *Franks* v. *Delaware*, 438 U.S. 154 (1978), that a challenge to a facially valid search warrant will be permitted only

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[1] In his Brief in Opposition, respondent contended that the Colorado Supreme Court's decision had an adequate and independent basis in state law (Br. in Opp. 2-3). We take no position on this contention but assume, throughout this brief, that the decision below is based on federal law.

if the defendant makes a substantial showing that the affidavit supporting the warrant contains material statements that were intentionally false or made with reckless disregard of the truth. Second, the Colorado Supreme Court gave grossly insufficient weight to the so-called informant's privilege—the government's right to withhold the identity of an informant unless the defendant can show a compelling need for disclosure.

1. The Colorado Supreme Court did not suggest that Sergeant DeNovellis's affidavit, on its face, failed to establish probable cause, and the affidavit manifestly does show probable cause if its statements are accepted as true. In *Franks*, this Court held that evidence obtained pursuant to a warrant based on such an affidavit may not be suppressed unless the defendant shows that the affidavit contained material statements that were intentionally false, or were made with reckless disregard of the truth. Innocent or negligent inaccuracies, the Court held, do not taint the warrant or require suppression of the evidence. 438 U.S. at 155-156, 171.

The Court in *Franks* explicitly noted that "[t]he deliberate falsity or reckless disregard whose impeachment is permitted today is only that of the affiant, not of any nongovernmental informant" (438 U.S. at 171). This follows directly from the language of the Fourth Amendment, the decisions of this Court, and the rule of *Franks* itself. The Fourth Amendment prohibits only unreasonable searches, and "a warrant based on information which the affiant and the magistrate both had reasonable grounds for believing is a reasonable one" (Kipperman, *Inaccurate Search Warrant Affidavits as a Ground for Suppressing Evidence*, 84 Harv. L. Rev.

825, 832 (1971)), even if the information is later discovered to be false or erroneous. Warrants may issue on probable cause, and if there was probable cause to believe the informant's statement to be true, its falsity does not vitiate the warrant. The Court made this point clear many times before *Franks*. See, *e.g.*, *United States* v. *Harris*, 403 U.S. 573, 579-580 (1971) (plurality opinion); *Rugendorf* v. *United States*, 376 U.S. 528, 533 (1964); *Jones* v. *United States*, 362 U.S. 257, 269-272 (1960). See also *Brinegar* v. *United States*, 338 U.S. 160, 176 (1949). And of course under *Franks*, if the affiant reasonably believed the informant's false statements—or even if he was merely negligent in failing to discover their falsehood—the warrant is not invalid. The Colorado Supreme Court gave no indication of understanding these fundamental principles.

Moreover, the Court in *Franks* emphasized that a defendant is not entitled to a hearing on the truthfulness of a warrant affidavit as a matter of course. A defendant is to receive such a hearing only if he "makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause" (438 U.S. at 155-156).

The Court required such a showing in large part because it was concerned that routine inquiries into the truthfulness of statements made in search warrant affidavits would prove burdensome and time-consuming for the courts and would be used for discovery by defendants. The Court recognized that law enforcement authorities were legitimately concerned that "if such hearings were conducted rou-

tinely * * * they would be misused by defendants as a convenient source of discovery. Defendants might even use the hearings in an attempt to force revelation of the identity of informants." 438 U.S. at 167. And the Court explained that "[t]he requirement of a substantial preliminary showing" is intended "to prevent the misuse of a veracity hearing for the purposes of discovery and obstruction" (*id.* at 170).

2. The informant's privilege serves many interests that are distinct from, but certainly no less important than, those protected by the rule of *Franks* v. *Delaware*:

> What is usually referred to as the informer's privilege is in reality the Government's privilege to withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with enforcement of that law. * * * The purpose of the privilege is the furtherance and protection of the public interest in effective law enforcement. The privilege recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law-enforcement officials and, by preserving their anonymity, encourages them to perform that obligation.

Roviaro v. *United States*, 353 U.S. 53, 59 (1957). For these reasons, "public policy forbids disclosure of an informer's identity unless essential to the defense" (*Scher* v. *United States*, 305 U.S. 251, 254 (1938)). A defendant seeking disclosure of an informant's identity accordingly bears a substantial burden even if the informant's testimony would be directly relevant to the question of guilt or innocence. See *Roviaro* v. *United States*, 353 U.S. at 60-63. See also *In re Quarles & Butler*, 158 U.S. 532, 535-536

(1895) ("It is the right, as well as the duty, of every citizen * * * to communicate to the executive officers any information which he has of the commission of an offence against th[e] laws; and such information, given by a private citizen, is a privileged and confidential communication * * * the disclosure of which cannot be compelled without the assent of the government.").

The reasons for this privilege are familiar. "'Courts have countenanced the use of informers from time immemorial'" (*Hoffa* v. *United States*, 385 U.S. 293, 311 (1966), quoting *United States* v. *Dennis*, 183 F.2d 201, 224 (2d Cir. 1950) (L. Hand, J.)), and the detection and prosecution of many crimes would simply be impossible without informants. This Court has repeatedly upheld the use of confidential informants as sources of information on which search warrants are based. See, *e.g.*, *Illinois* v. *Gates*, No. 81-430 (June 8, 1983), slip op. 22-23; *Rugendorf* v. *United States*, 376 U.S. at 533. If an informant's identity is disclosed, not only is he likely to become useless in further investigations, but he may be subject to reprisals. See *McCray* v. *Illinois*, 386 U.S. 300, 308-309 (1967), quoting 8 Wigmore, *Evidence* § 2374 (McNaughton rev. ed. 1961):

> Whether an informer is motivated by good citizenship, promise of leniency or prospect of pecuniary reward, he will usually condition his cooperation on an assurance of anonymity—to protect himself and his family from harm [and] to preclude adverse social reactions * * *. The government also has an interest in nondisclosure of the identity of its informers. Law enforcement officers often depend upon professional informers to furnish them with a flow of information about criminal activities. Revelation of the

> dual role played by such persons ends their usefulness to the government and discourages others from entering into a like relationship.

In this area, as with most privileges, certainty and predictability are vital. It is not enough that most informants' identities are not disclosed most of the time; law enforcement officers attempting to recruit informants must be able to assure them in advance that their identities will not be disclosed prematurely. "An uncertain privilege, or one which * * * results in widely varying applications by the courts, is little better than no privilege at all." *Upjohn Co.* v. *United States*, 449 U.S. 383, 393 (1981). Nowhere is this more likely to be true than in the difficult and volatile relationship between police and informants. The stakes for informants can be exceedingly high, and the informant's reaction may well be governed by rumor and rational or irrational fears. For this reason, in an area in which the authorities must rely on informants, even an occasional disclosure or the threat of disclosure can prove devastating to law enforcement efforts.

Even in camera disclosures can create serious difficulties. We assume that the inadvertent release of material revealed in camera can be reduced to a minimum or even eliminated; but an informant may not understand that disclosure of his identity to a judge is innocuous. Cf. *Baldridge* v. *Shapiro*, 455 U.S. 345, 361 (1982). In addition, if the informant is called to appear before a judge, there is a danger that the fact of his appearance will become known. Thus, while in camera disclosure of an informant's identity is, of course, vastly less harmful to the government's interests than public disclosure, it is not without potential costs.

3. Consequently, when a criminal defendant seeks to learn an informant's identity as part of a challenge to a facially valid search warrant, his burden is quite properly a great one. On the defendant's side, "the interests at stake in a suppression hearing are of a lesser magnitude than those in the criminal trial itself" (*United States* v. *Raddatz*, 447 U.S. 667, 679 (1980)); the defendant's interest is not in obtaining a fair trial of his guilt or innocence but only in furthering the prophylactic purposes of the exclusionary rule. See also *Lego* v. *Twomey*, 404 U.S. 477, 488-489 (1972).

Moreover, the justification for compelling the disclosure of an informant's identity is at its weakest when the informant's tip was used not to support a warrantless search but to obtain a warrant.[2] This is true because two aspects of the warrant process act as important safeguards against falsification by the police. First, the warrant affidavit commits law enforcement officers beforehand to a particular version of the facts that support the search. This greatly reduces the likelihood that the officers are inventing facts, because they cannot embellish their justification for the search by drawing on facts they learned only by conducting the search—as they might in the case of a warrantless search. Here, for example, Sergeant DeNovellis's statement that he received information that respondent possessed balloons filled with heroin is highly credible because it was on record before police officers found respondent with heroin packaged in precisely that form (see J.A. 69).

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[2] Even the dissenters in *McCray* v. *Illinois*, *supra*—a case involving a warrantless arrest based on an informant's tip—recognized this point. See 386 U.S. at 314-315 (Douglas, J., dissenting).

Second, when an officer's report of an informant's tip has been included in a warrant affidavit, it has already undergone a degree—potentially a substantial degree—of judicial examination at the hands of the magistrate. In issuing the warrant, the magistrate has necessarily reached a judgment about the affiant's credibility. In addition, under the Federal Rules of Criminal Procedure, the judicial officer issuing a search warrant may insist that the affiant appear before him and may examine the affiant and any other witnesses—including informants—under oath. Fed. R. Crim. P. 41(c)(1).

A defendant's interest in learning an informant's identity is accordingly at its most limited when the defendant seeks only to suppress evidence obtained under a facially valid search warrant. Arrayed against the defendant's limited interest are both the important policies that militate against collateral attacks on search warrants and the government's interest in protecting the identity of informants. For these reasons, the Court in *Franks* explicitly left open "the difficult question whether a reviewing court must *ever* require the revelation of the identity of an informant [even if] a substantial preliminary showing of falsity has been made." 438 U.S. at 170 (emphasis added).

B. Although it is difficult to describe in the abstract the kind of showing that should entitle a defendant to a hearing under *Franks*, it seems entirely clear that respondent's showing did not approach that necessary to obtain such a hearing—much less to compel disclosure of the informant's identity. Respondent offered only his own testimony;[3] and that testimony

[3] It appears from the transcript of the hearing on the suppression motion that respondent may have offered to provide affidavits from family members that would support his testi-

purported to show only that the informant's statements were false—not, as this Court specifically required in *Franks*, that the affiant deliberately or recklessly made a false statement.

1. The Court in *Franks* emphasized that a defendant's mere assertion that an affidavit contained deliberate or reckless falsehoods, or his mere demand for a hearing on the veracity of the affidavit, is insufficient to require a hearing. See 438 U.S. at 171. The only evidence respondent offered was his own testimony. While sworn testimony by a criminal defendant is more than a mere demand, it is not much more. It is hardly a controversial proposition that defendants faced with serious criminal charges are often willing to commit perjury in an effort to escape conviction. Respondent, for example, testified that he had no personal acquaintance with heroin, even though a police officer testified that he removed heroin from respondent's pocket (J.A. 54, 69). To the extent a defendant's own testimony is sufficient to entitle him to a hearing challenging a facially valid warrant, defendants will easily and routinely circumvent the threshold requirement for a hearing that the Court carefully established in *Franks*. See 438 U.S. at 155-156, 167, 170, 171-172.

To be sure, it is possible to imagine instances in which a defendant's testimony alone might be enough to require a further hearing, under *Franks*, to determine whether the warrant is based on reckless or intentional falsehoods. This might happen, for example, if the inherent plausibility of the defendant's state-

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mony (see J.A. 56). But the Colorado Supreme Court does not seem to have relied on this offer in concluding that respondent had made a sufficient showing to justify the trial court's order (see J.A. 137, 138-139).

ment is particularly compelling, if the nature of the dispute makes it impossible for the defendant to develop corroborating evidence, and if the affiant's testimony is not credible. But such circumstances should be very rare, and none of these circumstances was found to be present here.

2. Moreover, even if respondent's testimony were accepted as true, it was manifestly insufficient to obtain a hearing under *Franks*. Respondent testified to the effect that the *informant's* statements were false. This testimony does not tend to show that the *affiant's* statements were recklessly inaccurate or deliberately false; it is at least equally possible that Sergeant DeNovellis was innocently or negligently misled by a deceitful or mistaken informant. As the Court emphasized in *Franks*: "There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof. * * * Allegations of negligence or innocent mistake are insufficient." 438 U.S. at 171. Neither the trial court nor the Colorado Supreme Court found, or suggested any basis for finding, that respondent's testimony was a "substantial preliminary showing" (*id.* at 155) of reckless or deliberate falsehood by the affiant. Indeed, the Colorado Supreme Court was explicit in stating that such a showing is not required.

3. Perhaps more important, the Colorado Supreme Court held that respondent's own testimony contradicting the informant was sufficient not only to permit a challenge to the warrant but to require the disclosure of the informant's identity. When the State was unwilling to reveal the informant's name because it feared that doing so would place him in jeopardy (see J.A. 83), the heroin found on respondent's

person was suppressed. In *McCray* v. *Illinois*, the Court held that a defendant's mere demand does not entitle him to obtain the identity of an informant at a suppression hearing. Here, the Colorado Supreme Court, while not ordering the disclosure of the informant's identity on the basis of a mere demand, required such disclosure on the basis of the defendant's testimony that the informant's tip was incorrect —and as we have said, that amounts to little more than a mere demand.[4]

As this case illustrates, the Colorado Supreme Court's approach gives any defendant who is willing to contradict an informant's statement an easy means of defeating a criminal prosecution entirely whenever the State will not reveal the informant's identity because it believes it would endanger him if it did so. This will occur even though the statements in the search warrant affidavit were entirely true. Such an approach cannot be correct. As this Court has said (*McCray* v. *Illinois*, 386 U.S. at 306, quoting *State* v. *Burnett*, 42 N.J. 377, 385, 201 A.2d 39, 43 (1964)):

> If a defendant may insist upon disclosure of the informant in order to test the truth of the officer's statement that there is an informant or as to what the informant related or as to the informant's reliability, we can be sure that every defendant will demand disclosure. He has nothing to lose and the prize may be the suppression of damaging evidence if the State cannot afford to reveal its source, as is so often the case.

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[4] In addition, as we noted, the justification for requiring the disclosure of an informant's identity is significantly weaker when a defendant is challenging a search warrant than when he is challenging a warrantless search like that involved in *McCray*. See pages 13-14, *supra*.

C. Even if a trial court determines that a defendant made the showing required by *Franks*, it should not order the disclosure of an informant's identity, even in camera, as a matter of course.[5] We have previously explained that the defendant's interest in learning the identity of an informant in order to seek the suppression of evidence obtained through a warrant is decidedly limited, while the government's interest in protecting the confidentiality of informants —even from in camera disclosures—is substantial. In addition, as we will show, revealing the informant's identity will often be less useful than it might appear in determining whether the warrant is tainted by deliberate or reckless falsehoods; and there are alternative methods not requiring the disclosure of the informant's identity for making that determination. For these reasons, even in camera disclosure should be the last resort. Disclosure of the informant's identity to the defendant is warranted, if at all, only in the most extraordinary circumstances.

1. The issue at a hearing conducted pursuant to *Franks* is the affiant's credibility, not the informant's. The affiant will usually be a law enforcement officer, and ultimately the trial judge will have to decide whether he is truthful. The judge's resolution of that question is likely to depend principally on his assessment of the officer's own testimony, not on the testimony of an alleged informant whose interests and motivations may well be inscrutable. In particular, if an informant's identity is being kept confidential because, according to the authorities, he fears reprisals,

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[5] There appears to be some tendency among courts to require the in camera disclosure of an informant's identity as a matter of course once anything approaching the preliminary showing required by *Franks* has been made. See, *e.g.*, *United States* v. *Kiser*, No. 82-1487 (9th Cir. Sept. 26, 1983).

then any testimony he gives after the possibility has arisen that his identity will become known to the defendant will automatically be suspect.

The affiant can be cross-examined by defense counsel. The scope of that examination will necessarily be limited by the need to protect the informant's identity, but it can nonetheless often be very thorough. See, *e.g.*, *McCray* v. *Illinois*, 386 U.S. at 303 (on cross-examination, affiant gave names of persons convicted of narcotics violations as a result of information supplied by confidential informant). Plainly the trial judge should have the discretion to decide that cross-examination of this form is sufficient to test the officer's credibility, and the judge should not permit measures more likely to disclose an informant's identity unless he specifically finds this more cautious approach to be inadequate. Cf. *United States* v. *Kiser*, No. 82-1487 (9th Cir. Sept. 26, 1983), slip op. 4720 nn. 4-5 (rejecting district court's decision to proceed in this fashion without explaining why it was inadequate, even though suspected informant was already dead by time of suppression hearing).

2. In addition, or alternatively, the trial judge can order an in camera proceeding in which the affiant is questioned by the judge. With defense counsel excluded, the affiant is likely to be able to reveal more information, since the government need not be concerned that the defendant will put together pieces of innocuous information and identify the informant. The court can, threfore, examine the affiant more completely without requiring him to produce the informant or even to reveal the informant's identity. While defense counsel would not be physically present at such a hearing, he can participate by suggesting lines of inquiry to the trial judge. Moreover, the record of an in camera hearing can be reviewed by

an appellate court to determine whether the trial judge was sufficiently probing in his inquiry.

3. As a practical matter, a trial judge should generally be able to assess an officer's credibility by permitting limited cross-examination and by examining the officer in camera. But if it is necessary for the government to produce the informant, we can think of no reason why an in camera examination of the informant will not always be sufficient. See 1 LaFave, *Search and Seizure* 584 (1978).

While adversary proceedings are customary in our system, the Fourth Amendment provides a conspicuous exception. It reflects a judgment by the Framers that in a wide range of cases—at least all those in which no adequate retrospective remedy is available—ex parte proceedings are sufficient to protect the interests underlying the Warrant Clause. Ex parte, in camera proceedings are an acceptable basis for issuing a warrant precisely because an adversary hearing at that stage might impair law enforcement interests. See generally *Zurcher* v. *Stanford Daily*, 436 U.S. 547, 560-561 (1978). When an adversary hearing on a motion to suppress will cause an informant's identity to be disclosed, such a hearing will also inflict serious costs on important societal interests. In such instances, the ex parte, in camera procedures that the Framers thought sufficient before the fact should also be sufficient after the fact. Cf. *Palermo* v. *United States*, 360 U.S. 343, 354-356 (1959).

Indeed, an in camera hearing to determine if evidence should be suppressed has several advantages over a hearing before a magistrate on a warrant application. It will not be conducted in haste. The trial judge, unlike the magistrate, will be "acquaint[ed] with the information that may contradict the good faith and reasonable basis of the affiant's allegations"

(*Franks*, 438 U.S. at 169). And a trial judge may be more inclined than a magistrate to examine the government's evidence critically.

CONCLUSION

The judgment of the Colorado Supreme Court should be reversed.

Respectfully submitted.

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DECEMBER 1983

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No. 82-1945-CSY
Status: GRANTED

Title: Colorado, Petitioner
v.
Antonio Guadalupe Nunez

Docketed:
April 19, 1983

Court: Supreme Court of Colorado

Counsel for petitioner: Bernard, Steven Leon

Counsel for respondent: Stern, Kenneth

Entry	Date	Note	Proceedings and Orders
1	Apr 19 1983	G	Petition for writ of certiorari filed.
2	Jun 15 1983		DISTRIBUTED. September 26, 1983
3	Jul 7 1983	F	Response requested.
4	Aug 5 1983	X	Brief of respondent Nunez in opposition filed.
5	Sep 15 1983	X	Reply brief of petitioner Colorado filed.
6	Oct 3 1983		Petition GRANTED.
			**********
7	Nov 8 1983	D	Motion of respondent to dismiss writ for want of jurisdiction filed.
8	Nov 9 1983		DISTRIBUTED. November 23, 1983. (Motion of respond. to dismiss writ for want of jurisdiction).
9	Nov 12 1983		Brief of petitioner Colorado filed.
10	Nov 12 1983		Joint appendix filed.
11	Nov 17 1983		Brief amicus curiae of Colorado Dist. Attys. Council filed.
12	Nov 18 1983		Opposition of Colorado to motion of respondent to dismiss writ for want of jurisdiction filed.
13	Nov 28 1983		Motion of respondent to dismiss writ for want of jurisdiction DENIED.
14	Nov 26 1983		Record filed.
15	Nov 26 1983		Certified original record received.
16	Nov 17 1983		Brief amicus curiae of United States filed.
17	Dec 12 1983		SET FOR ARGUMENT. Tuesday, January 17, 1984. (1st case)
18	Dec 12 1983		CIRCULATED.
19	Dec 17 1983	X	Brief of respondent Antonio Guadalupe Nunez filed.
20	Dec 16 1983		Brief amicus curiae of ACLU, et al. filed.
21	Jan 17 1984		ARGUED.